

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

HEARINGS

BEFORE THE

**SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT**

OF THE

**SELECT COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES**

NINETY-FIRST CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 66

**A RESOLUTION CREATING A SELECT COMMITTEE TO CONDUCT
STUDIES AND INVESTIGATIONS OF THE PROBLEMS
OF SMALL BUSINESS**

VOLUME 2

**WASHINGTON, D.C., FEBRUARY 4, 5, 6, 26, 27;
MARCH 3, 4, AND 11, 1970**

Printed for the use of the
Select Committee on Small Business



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SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

WEDNESDAY FEBRUARY 4, 1970

**HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,
*Washington, D.C.***

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359, Rayburn House Office Building, Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representatives Dingell and Conte.

Also present: Gregg Potvin, general counsel; T. J. Oden, counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

Mr. Reporter, the record will indicate that there is a quorum here for the purpose of transacting business.

This is a continuation of the hearings of the Special Subcommittee on Small Business and the Robinson-Patman Act.

We are honored to have as our first witness this morning a man whom I very much respect and admire, a distinguished practitioner in the antitrust law field, and a distinguished former public servant, Chairman of the Federal Trade Commission, an old friend, and one for whom I have a great deal of personal fondness. It is a privilege to welcome Mr. Earl W. Kintner to the committee for such testimony as he chooses to give.

Mr. Kintner, we are honored to have you with us this morning. I notice that you have with you two of your associates. If you would, please identify and introduce each of them for the record.

STATEMENT OF EARL W. KINTNER, ESQ., FORMER CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY JACK L. LAHR AND EUGENE J. MEIGHER

Mr. KINTNER. Thank you, Mr. Chairman and gentlemen.

I am accompanied here today by Jack L. Lahr, who is one of my law partners, on my right; and on my left, Mr. Eugene J. Meigher, who is an associate lawyer who works with me in our law firm.

Mr. DINGELL. Mr. Meigher and Mr. Lahr, we are most pleased that you can be with us this morning. We thank you for coming.

Mr. KINTNER. They have worked on this project with me of analyzing these various reports that deal with the Robinson-Patman Act, and I am indebted to them for their assistance.

We appear here representing only ourselves and no clients. We appear because we are interested in the Robinson-Patman Act, interested in supporting that law, and if possible encouraging its more effective enforcement.

I am Earl W. Kintner, an antitrust lawyer and a senior partner of the Washington, D.C., law firm of Arent, Fox, Kintner, Plotkin & Kahn.

I appear today to speak in defense of the Robinson-Patman Act as a necessary and integral part of antitrust enforcement policy in the United States. At the outset I would like to comment upon certain basic presuppositions which have been bruited about in recent years and which in my opinion embody a distorted notion of our national economic policy. Second, I will address myself to certain of the specific criticisms recently lodged against the Robinson-Patman Act.

I

RELATIONSHIP OF THE ROBINSON-PATMAN ACT TO ANTITRUST POLICY

Foremost among the erroneous presuppositions is the contention that vigorous enforcement of the Robinson-Patman Act is antithetic to the national antitrust policy of hard price competition and that the threat of enforcement has inhibited competition in some industries. Such a contention displays an excessively simplistic notion of what our national economic policy is with respect to trade and commerce, and fails to take account of the variety of objectives which that policy embraces. Specifically, the critics of the Robinson-Patman Act have chosen to ignore the many instances in which Congress has consciously chosen to reconcile the policy embodied in the Sherman Act with other complementary goals.

The general policy enunciated in the Sherman Act, of free and open price competition, has many qualifications. The most obvious example, of course, is the regulated industries, where the movement of prices and market entry are subject to control by administrative agencies. This represents a portion of our economy which Congress has chosen not to expose to the unmitigated forces of competition. Likewise, in nonregulated industries, Congress has seen fit to provide incentives and assistance in order to attain certain objectives which market forces alone might not accomplish. I have in mind the mechanism provided under the Federal Property and Administrative Services Act, the Small Business Investment Act, the Small Business Act and in congressional statements of Government procurement policy, such as the Armed Services Procurement Act, all of which are designed to foster small business. No realistic statement of our national policy regarding trade and commerce can fail to acknowledge these objectives, and no balanced commentary on that policy can fail to mention the role of the Robinson-Patman Act in furthering them.

Passage of the Robinson-Patman Act was preceded by a long history of small businessmen being discriminated against, and that danger is as real today as it was in 1936.

The role of the Robinson-Patman Act in the general scheme of antitrust enforcement needs to be more fully appreciated. For example, it is not generally acknowledged that Robinson-Patman makes a con-

tribution to challenging the increase in industrial concentration. For many years there has been widespread concern over the growing concentration in many industries. While this phenomenon is of immediate concern in connection with enforcement against mergers and monopolies, Robinson-Patman has a long-range complementary role in this connection because anticompetitive price discrimination, if not carefully prevented, could lead swiftly and surely to the demise of many companies. Possibly, if price discrimination became widespread, the impetus to increasing industrial concentration could be even greater than that caused by the current merger movement. And the competitive effects could be even more disastrous. Thus, an economically powerful buyer could more cheaply get rid of his smaller rivals by inducing price discriminations than by acquiring those rivals.

PROTECTING THE INEFFICIENT

A frequently heard criticism of Robinson-Patman Act enforcement is that it conflicts with Sherman Act policy by perpetuating the inefficient in business. I know of no reliable factual basis for this assertion, and the statistics of business failures, corporate mergers, and rising concentration tend to refute this hypothesis. The Robinson-Patman Act provides no bar to vigorous price competition between companies, and it has not prevented businesses from being driven to the wall in the competitive process. But the act does prevent large buyers from getting unfair purchase price advantages from their suppliers, to the disadvantage of smaller rivals.

The retail grocery industry is a case in point. The passage of the Robinson-Patman Act in 1936 was to a large extent attributable to widespread complaints about the unfair price advantages enjoyed by chain stores in purchasing from suppliers. Yes, in coping with this problem, this Act has not obstructed the growth of the grocery chains. In fact, the growth of the grocery chain stores has continued unabated since 1936, and the decline in importance of very small grocery stores has been steady. I think the record in this industry provides a good example of how Robinson-Patman helps competition to function fairly without perpetuating the structure or membership of the industry. The same, I am sure, is true in other industries.

Another way in which this criticism against Robinson-Patman is sometimes put is that it tends to protect competitors instead of focusing—as it should—upon the effects of discriminatory practices upon market competition as a whole. Possibly, there may be some surface justification for this line of argument, based on reference to a few isolated litigated cases or a particular enforcement program, but by and large the criticism implies a misleading distinction. In many, if not most, situations injury to competitors and injury to competition go hand in hand. This is particularly true in a concentrated market where the loss of a single competitor may have immediate effects on the market. In other cases the overall competitive implications of a particular kind of price discrimination are more long range. For example, in the Morton Salt case, where large retailers secured more favorable prices than their rivals, the competitive impact must have been rather small since table salt represents a small fraction of the retail grocer's business. Nevertheless, in finding the requisite com-

petitive effects, the Supreme Court took note of the practical impossibility of establishing general injury to competition in such situations. In the Court's words:

Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocery from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

The justification for such a ruling is based on the common sense awareness, the truth of which economists recognize, that the existence of price discrimination is evidence of market power. It is clear that, unless a particularly purchaser possesses some economic leverage or power which other purchasers lack, there is no reason why sellers would choose to favor him. Granted that in some cases the purchaser may legitimately exercise this leverage and may be entitled to a lower price, it is to prevent the misuse of this market power or leverage that this Act is directed.

Mr. DINGELL. At this point, wouldn't it be fair to observe that the position that you have to show substantial injury would be, first of all, to throw out the case you have just alluded to?

Mr. KINTNER. That is right. I point that out later in my statement, Mr. Chairman.

Mr. DINGELL. Isn't it also a fact, as you point out, that if you have a large number of small transactions you might have a tremendous cumulative effect, as you point out in your statement here. If you were to apply the test of saying it had to be substantial in each instance, you would completely ignore the total and cumulative effect of a large number of possible price discriminations that might be at least as destructive as one very large case of discrimination, where you could finally show that it was substantial, in fact much more so because it would wipe out the entire small business.

Mr. KINTNER. Yes, this erosion or nibbling away can operate just as well in the economy as it can through the wind and the rain out in the hills and the mountains.

Mr. DINGELL. Thank you.

I am sorry to interrupt your statement.

COMPARISON WITH THE SHERMAN ACT

Mr. KINTNER. I disagree with the remark in the Stigler report that " * * * we can conceive of no case of discrimination in which the Sherman Act would not provide an adequate remedy * * * ." I think the Stigler report's comment attributes to the Sherman Act a scope which it does not have under existing case law and which it is not designed to include. Nor is the Sherman Act as well suited as the Robinson-Patman Act to handling this problem. To mention one important difference, Robinson-Patman is an incipency statute—that is, it is designed to deal with practices whose probable effect is to cause a substantial lessening of competition. The Sherman Act's reach is not that great. Moreover, Robinson-Patman is designed to cope with price discrimination more efficiently, since it approaches problematic situations with specific criteria and specific defenses. Case-by-case handling of price discrimination under the rule of reason would be very cumbersome.

In my view, the court's approach in *Morton Salt* was eminently sound. I think it a fair inference that such practices, if not forbidden, would lead step by step to widespread price discriminations which would substantially lessen competition.

This is the point, Mr. Chairman, that you just made. Since this act—like the merger section of the Clayton Act—is meant to deal with these competitive evils prospectively, it seems proper to nip these instances of price discrimination in the bud. Inferences about probable competitive effects are just as proper in this area as in the merger context, where presumptions arise with market shares in horizontal acquisitions.

It should also be kept in mind that the Robinson-Patman Act does not ban all price differentials. Sellers are permitted to have different prices in different trading areas and different prices for functionally noncompeting customer classes within trading areas. At the primary line, regional price cutting even by sellers with substantial market shares may be permissible. And I cite cases on this. Indeed, rugged price competition on a regional basis has been waged in such industries as beer, ice cream, and baby food without a finding of violation of the Robinson-Patman Act. The same is true when geographic price variations are viewed from the standpoint of measuring competitive effects at the buyer's level. Such variations are forbidden only when it appears that buyers located in adjacent areas are mutually competitive. Citing the *Purex* case.

THE TENDENCY OF PRICE DISCRIMINATION

Another presupposition, which the Neal report adopted as a premise to its recommendations, is the notion that normally price discrimination is prompted by impulses which would lead to improved functioning of the competitive process and that only in exceptional instances would price discrimination adversely affect competition. I find little in our enforcement experience under the act which substantiates this notion. Moreover, as I pointed out in my appearance before this subcommittee on October 7, 1969, the contention that price discrimination should normally be expected to accomplish widespread, procompetitive effects has not been substantiated by any empirical data. Indeed, the only tangible basis for these assertions has been abstract economic analysis of how a highly concentrated industry might behave if price discrimination were permitted. For example, the Neal report, without reference to any particular industry situation, reasons that price discrimination might encourage competition in highly concentrated markets. Since the adverse competitive impact upon disadvantaged buyers is far more obvious than the alleged competitive benefits, the assumption of the Neal report requires a good deal more substantiation than has been presented thus far. I think that on this critical point the Neal report has failed to meet its burden of proof.

While it is abstractly possible that an instance of price discrimination could be the first step in a process of lowering prices and that by a series of such price discriminations industrywide prices could reach a lower level, this strikes me as a rather flimsy basis for assuming that as a general rule price discrimination is procompetitive. In the first place, the economic model for this reasoning is a highly concentrated in-

dustry. There is no reason to think that price discrimination would have similar effects in other kinds of industries, and I am sure it is not necessary to remind this subcommittee that Robinson-Patman enforcement frequently involves industries that are not highly concentrated. Clearly, in such situations there is no reason to think that discounts to a few select buyers would lead to marketwide price reductions.

A more telling point against the Neal report's assumption is that enforcement experience under the Robinson-Patman Act fails to document a single instance where unlawful price discrimination tended to accomplish an industrywide reduction in prices toward lower, non-discriminatory levels. Surely, if the Neal report were correct in implying that presently unlawful price discrimination would normally bring about lower price levels, examples of this should be abundant, for in many cases price discrimination was practiced long before being attacked by the Government—sufficiently long for general price reductions to occur, if ever they were going to occur. For myself, I know of no reason for expecting that a seller who was pressured into giving a price advantage to a purchaser with economic leverage will freely extend the same advantages to purchasers without comparable economic leverage.

Finally, if price discrimination had the salutary effects which its defenders claim, there ought to be available examples among the highly concentrated industries not covered by the Robinson-Patman Act, for example, in the service industries, which do not deal in commodities. I know of no such example, and apparently neither do the critics of Robinson-Patman.

II

Turning to the specific criticisms of the Robinson-Patman Act found in the Stigler and Neal reports, I will focus upon a few of the more substantial points of criticism. It is impossible to cover all the arguments because of the buckshot approach employed by the critics. Many of the criticisms are far from specific and involve such obvious overstatements that no rebuttal is required. Other criticisms are excessively vague and undocumented; their only support is the abstract economic analysis referred to above.

And I am not criticizing economists, I have the greatest respect for economists, but I think they ought to operate in an aura of reality, not abstract theory. And we do have to deal with realities in the marketplace.

Thus, the Neal report states that the Robinson-Patman Act has had anticompetitive effects by discouraging price differentials which might have improved competition by lessening the rigidity of oligopoly pricing and by encouraging new entry. Against this nebulous claim I can only point to the long history of enforcement against price discrimination, which indicates that the common phenomenon is not, as the critics suggest, oligopolists trying to reduce price levels, but rather sellers acquiescing in the demands of large customers for favored prices to the detriment of small customers.

One comment applies to most of the specific criticisms and recommendations of both reports, namely, that they are based upon the dubious economic assumption that the price discrimination is gen-

erally precompetitive and only exceptionally anticompetitive. I have already expressed my views on that assumption. Suffice it to say that the specific recommendations are no more valid than is that assumption.

In order to avoid being repetitious let me point out a flaw which affects many of the Neal report's recommendations. Many of the recommended provisions are phrased in terms of complicated formulas which state various tests which bring the prohibitions or defenses of the act into play. In my opinion, this verbiage adds nothing to the precision of the act. On the contrary, it serve two objectionable purposes. First, it thrusts upon the Government a more complicated and difficult burden of proof, thereby making more than occasional enforcement impracticable. Second, it deprives the courts of the flexibility needed to fashion meaningful rules from the facts presented. Since efficient administration of the law depends on the formulation of meaningful assumptions and rules, the convoluted language proposed by the Neal report will bring enforcement to a virtual halt.

PRIMARY LINE INJURY

Turning to particulars, the proposed revision concerning primary line injury would reach only the most aggravated of situations, which would probably be reached in any event under section 2 of the Sherman Act. Thus, to show a primary line violation one would have to show that the discriminating company is (1) in competition with others serving significantly more limited areas; (2) the discrimination is restricted to one or more such limited areas; (3) the discrimination is less than the reasonably anticipated longrun average cost of serving those areas; and (4) it imminently threatens to eliminate from that area one or more competitors whose survival is significant to the maintenance of competition. It is frankly admitted that this provision would reverse the result in *Utah Pie v. Continental Baking Co.*

There is no good reason for thinking that the recommended provision is superior to the language now in effect. The statute presently is couched in terms of effect on competition whereas the recommended language depicts only a narrow set of circumstances which would be objectionable. Not only is it presumptuous to think that all possible anticompetitive circumstances can be anticipated and provided for, but the proposed language has the very defect for which the critics have excoriated the Robinson-Patman Act; namely, description of effects in terms of competitors rather than competition.

The proposed revision would be objectionable if for no other reason than that it interferes with the flexibility of the courts in fashioning meaningful standards in this area. Over and above that, however, this proposed language departs from the spirit of Robinson-Patman, which is to nip these practices in the bud, before the damage is done. The proposed language, on the other hand, would only apply where there exists an imminent threat of elimination of a competitor whose survival is significant to competition.

This is a far cry from what Robinson-Patman sets out to accomplish and, in my view, is hopelessly inadequate. Since I see very little basis for believing that price discrimination will commonly ripen into lower price levels, I cannot view with equanimity—as the authors of this

provision obviously do—the elimination of so many business units, as long as the importance of their elimination to competition cannot be clearly gauged.

SECONDARY LINE INJURY

With respect to secondary line competitive injury, enforcement would be narrowly confined to situations like that in Morton Salt where large buyers are systematically favored over small buyers. A second test would apply in the case of discriminations not involving a systematic pattern, situations where the discrimination threatens to destroy one or more of a few significant competitors and where entry of new competitors is not easy.

While the revised language purport to cover the factual situation in Morton Salt (systematic favoring of large buyers), it appears not to cover the rationale in that case. Needless to say, I agree with the Neal report's admission that this is "a radical departure" from established law.

Earlier I discussed the Morton Salt decision and my reasons for believing it to be a wise holding. Admittedly, the competitive effects at the buyer's level of a single seller's discrimination are often subtle, especially when the product in question is only one among many products handled by the buyer. And this again is the point which you made earlier, Mr. Chairman. However, it is obvious that if the buyer experienced discrimination from many such suppliers the consequences would be harmful. The question, then, is where to draw the line, and I suggest that there is no more practical place than where Morton Salt draws it. If numerous acts of price discrimination were tolerated until it was determined that one more instance of discrimination would cause substantial competitive inquiry, such determinations would tend to be made too late. Quite rightly, Robinson-Patman deals with discrimination before its effects are actually felt. The act deals, wisely, I think, in probabilities, that is, it forbids those practices whose probable effects are to harm competition. Nor does such an approach unduly restrict seller in his pricing decisions, since there is nothing to prevent a seller from granting discounts to certain purchasers, if cost savings or other statutory defenses can be shown. Absent such a justification, however, the dangers of competitive injury are far more real than the speculative advantages to price competition.

The revised language would also cover certain situations of secondary line injury not involving a systematic pattern of discrimination. The language that discrimination is unlawful when it will "significantly impair competition at the buyer level" does not improve the precision of the act.

Certainly, it is meant to impose a more permissive standard upon ad hoc price discrimination but it is far from clear how far the discrimination must go before violating the proposed standard. The proposed language is reminiscent of the standard used in the merger context. If that is the test which is proposed, price discrimination could go very far before being stopped, for the number of competitors would have to be reduced to a handful before the elimination of one or more could be thought to be significant. Again, such a standard would be hopelessly inadequate.

TERTIARY LINE INJURY

The revised language would also rule out any violation based upon tertiary line injury on the grounds that such a basis for liability tends to impede price competition by inducing producers to police the resale prices of their distributors. The answer, however, to this argument is short and simple: failure to deal with tertiary line injury would leave the act with a gaping loophole. It would allow price discriminators to avoid the sanctions of the act by the simple expedient of adding an additional link to the distribution chain. Nor is this a fictitious prospect, as events have shown. And I cite cases.

BROKERAGE, SERVICES, ALLOWANCES

Strong criticism has been leveled against subsections (c), (d), and (e) for applying an excessively rigid test. It has been recommended that these subsections be replaced with a looser standard which would require a showing in each case of the market effects of the challenged practice. In my view, these suggestions are impracticable and, if implemented, would result in little or no enforcement against the practices presently condemned by those subsections. In effect, then, the proposal of the Neal report is a recommendation to abolish this area of enforcement through weakening amendments.

Without getting into the merits of particular practices, I would like to make a few observations in defense of the present provisions. First, the prohibitions in these subsections are based on a congressional finding that the practices in question are highly susceptible of being used as evasions of the act and could present serious obstacles to the general enforcement of the Robinson-Patman Act if they were not prohibited. At the same time, it was appreciated that an unrealistic expenditure of time and resources would have to be made if the economic merits of each such practice were threshed out in every instance. Consequently, Congress determined that these practices ought to be subjected to a rule that facilitated adjudication and administrative review. In this respect these subsections are analogous to the *per se* rules which the courts apply to practices such as price fixing under section 1 of the Sherman Act. The imposition of such a rule is fair because the practices in question are so inherently anticompetitive as to be seldom, even if sometimes, defensible and because efficient enforcement requires such an automatic rule.

Since these practices can accomplish the same results as outright price discrimination, they cannot be ignored, and I believe that the present subsections are best tailored to bring about effective enforcement. We are talking about practices that are characteristically short term. If a full-blown economic inquiry had to be made each time one of these practices were used, enforcement would grind to a halt. There would be no proportion between the questionable practice and the efforts that the Commission would have to mount to cope with them.

The changes which have been proposed would require an exorbitant expenditure of time and effort to find and prove a violation. The result would be longer, more complicated proceedings and, probably, more sporadic enforcement. Moreover, the effect in the business community would be no less harmful, for the looser, more complex legal standards

would throw the business community into doubt as to how to comply with the act.

RECOMMENDATIONS WORTH FURTHER STUDY

Finally, I would like to point out certain recommended changes which appear to be consistent with the purposes of the Robinson-Patman Act and which deserve further study. Thus, I find some appeal in the suggestion that the jurisdictional scope of the act be broadened to include "the sale, lease, transfer, or provision of any commodity or service." Likewise, the provision that an offer to deal on discriminatory terms should be treated as a completed transaction makes good sense. This provision would remedy a troublesome jurisdictional defect in the present act, under which a buyer who has been quoted a discriminatory price has been held not to have a right of action unless he goes through with a completed purchase, citing cases. Under the recommendation the seller's offer would fall within the scope of the act.

I am less certain about the provisions that would declare that section 5 of the Federal Trade Commission Act should not be held to prohibit any discrimination covered by the Robinson-Patman Act. Historically, section 5 has been used to cure certain jurisdictional defects of the Robinson-Patman Act. Citing the *Grand Union* case. However, if those defects were remedied, I would have no objection to the proposed language.

Further clarification should be made concerning the proposed defense to a charge of discrimination that the lesser price was available, on reasonably practicable conditions, to the persons discriminated against. If this defense simply means that the disfavored buyer could have obtained a discount but chose not to take the steps to do so, I fail to see why a formal defense is needed. In that case it would appear that there would be no injury to competition. In short, it is far from clear what the proposed language intends to do, and some further clarification is necessary.

I cannot conclude without taking issue with those who suggest that the history of Robinson-Patman has been essentially a process of our national antitrust policies being frustrated. I do not doubt that enforcement of the act could have been more enlightened, but I think that history vindicates the authors of the act in their essential view of what price discrimination would lead to and what was needed to cure this injurious practice.

The Robinson-Patman Act is not based upon an abstract economic model, but upon the bitter experience of struggling competitors whose rivals received favored treatment simply because of their buying power. The act was not passed to give these businessmen a free ride. They only asked that upon entering the competitive fight, they not be penalized for inferior buying power. And this, let me repeat, it not a hypothetical problem. It is an experience documented in the records of numerous cases.

Finally, the Robinson-Patman Act is not a superfluous act, dealing with problems which other statutes—notably the Sherman Act—could remedy just as well. Robinson-Patman is uniquely tailored to cope with price discrimination before the damage is virtually irreparable and well before industry structures are so thoroughly upset as to be

beyond restoration. In this way it serves the same purpose as section 7 of the Clayton Act, the purpose of maintaining industry structures which are conducive to free and open competition. No amount of rhetoric can persuade that the Sherman Act can shoulder this task, and no amount of carping about deficiencies of enforcement of the Robinson-Patman Act can detract from the central purpose of the act, which is to insure that buyers start the competitive conflict on reasonably fair terms.

Mr. Chairman, this concludes my prepared remarks. I will be happy to try to answer any questions.

Mr. DINGELL. Mr. Kintner, you have presented the subcommittee with a most helpful and carefully prepared statement, for which I wish to commend you.

Mr. Conte.

Mr. CONTE. Mr. Kintner, I have here an article which appeared in the Washington Post earlier this week, and it refers to a staff report recently prepared at the FTC concerning the Robinson-Patman Act. I would like to quote from the newspaper article. It says:

The emphasis of the Robinson-Patman enforcement commission is due in large measure to the high visibility of the entrepreneurs that are the natural constituents of the statute, as compared with the almost complete invisibility of the rather anonymous members of the consuming public that are the potential beneficiaries of competitive prices.

The Post article further states that the staff report finds—

That in the long run the American consumer suffers from the FTC's enforcement of the Robinson-Patman Act.

Would you care to comment on this?

Mr. KINTNER. Well, Mr. Conte, I haven't read that report. I haven't had that privilege, as the Washington Post reporter apparently has. If I had read it I would be able to comment perhaps in a more informed fashion. I see no empirical data in this—I have seen the news story, and I noted no empirical data to back up the conclusions purportedly coming from a staff report of the Trade Commission. Apparently two men from the Trade Commission, two lawyers, made this report. Based upon my knowledge of the thinking of the staff of the Trade Commission—and I realize I have been away from there 9 years, now, but I don't think I am unacquainted with the thinking of the staff—I would say that these two gentlemen who filed this report with the Trade Commission represent a decidedly minority view of the staff of the Federal Trade Commission.

If I were you I would inquire, I think, whether other staff people also filed reports. And maybe if I were at the Trade Commission and in a position of authority, I would want to know why that report was leaked to the press, for what purpose, and whether or not it indeed is a report which has data to back up some conclusions with which I for one disagree.

Mr. DINGELL. Would the gentleman yield?

Mr. CONTE. Surely.

Mr. DINGELL. The Chair would like to observe that both the Chair and the general counsel of the committee, Mr. Potvin, read the article in question, a copy of which we are assured is forthcoming shortly from the FTC. It occurs to me that it would be well for us to make that

available for you, Mr. Kintner, to look at. We would like to have your comments and suggestions, because you are a very distinguished former Chairman of that body.

It is the intention of the Chair, at the proper time when the appropriate witnesses are before this committee, to ask such questions as are proper concerning their report and possibly to review the circumstances attending not only upon the report but also the circumstances that led to its publication in this novel fashion.

I thank the gentleman for yielding.

Mr. KINTNER. It does occur to me that there were perhaps other staff reports. I would be surprised if only two members of the staff filed only one report. I would think probably, without knowing, but just speculating that, this probably was part of a unified effort to elicit for the benefit of the Commission staff views on Robinson-Patman enforcement, which of course is a very proper subject of inquiry by the Commissioners of the staff. And I would hope that if there are other staff views to the contrary, that they are made available to this committee too. And I would like to see them.

Mr. CONTE. I would agree with you there.

By the same token, though, when you mentioned that we should look into how this report—and I haven't seen the report except in terms of the article in the Washington Post—reached the press, I also imagine it would be appropriate to determine whether the report had been suppressed.

Mr. KINTNER. I don't know that it was myself. I have no knowledge on this subject. It doesn't sound like a staff report to me. It sounds like comments made by members of the staff to one or more commissioners. I wouldn't give it the dignity of identifying it as a staff report of the Federal Trade Commission, that is the point I would like to make at this time, unless I learned more about it.

Mr. DINGELL. This is one of the facts that the Committee intend to go into.

Mr. Potvin.

Mr. POTVIN. Mr. Chairman, because of the comments of the so-called report in the record at this point I would like, if I may, to informally, but nonetheless for the record, report to the Chair and the members of the subcommittee the following finding as a result of an inquiry I have undertaken to determine the nature of this alleged report. It has been established that it neither had nor has any official status, and it certainly may not accurately or properly be denominated a Commission staff report. It is in fact a piece of paper containing the personal views of two extremely junior members of the staff. This inquiry was done, of course, at the direction of the Chairman of this subcommittee.

Mr. WERTHEIMER. With respect to that, could I ask the counsel a question? The article states that the report was originally prepared at the request of then Chairman of the FTC Dixon. Do you know whether that is an accurate or an inaccurate statement.

Mr. POTVIN. If I may, Mr. Chairman, respond to minority counsel's question in this manner. Mr. Dixon will, as soon as a mutually convenient date can be set by the subcommittee and the members of the Commission, be appearing before this body. By telephone this morning, he informed me that he would have with him at that time and place a copy of the report, he would submit it to the subcommittee,

and he would answer any and all questions that the members of the subcommittee or the staff of the subcommittee had concerning the origin, the legitimacy and the genealogy of the alleged report.

Mr. KINTNER. I would have to agree that I don't think that in recent years the Robinson-Patman funds have been as effectively used at the Trade Commission as they could have been used. And I don't intend to point the finger at either the staff or the Commissioners when I come to this conclusion.

But I think it is abundantly clear that more could have been done and should have been done at the Trade Commission in the past several years in more effective enforcement of the Robinson-Patman Act.

At the same time I would point out, somewhat in mitigation of what I have just said, that a great deal of informal enforcement, voluntary enforcement, has taken place at the Trade Commission under its informal procedures. Many corrective actions involving price discrimination matters and practices in many instances have been effected by the staff on an informal basis, short of bringing litigation.

Now, this can be a very effective use of public money, because litigation is extremely expensive, and sometimes quite prolonged, so that sometimes the patient is dead before the cure is effected.

There is much to be said for this informal corrective procedure which the Commission has initiated in the past 10 years or 12 years. And to the extent that these corrective actions have been taken on Robinson-Patman matters—and many have been—I think that the Committee should applaud the Commission. And I would say that to that extent the money, the funds of the Commission, in this area of Robinson-Patman, have been wisely spent.

Mr. CONTE. The ABA study on the Federal Trade Commission recommended that a thorough-going study be undertaken by the Trade Commission to explore the relationship of the Robinson-Patman Act to the antitrust laws and to consumer protection matters. As a former Chairman of the Federal Trade Commission do you feel that such a study would be advisable?

Mr. KINTNER. I don't have any serious objection to it. But numerous studies have been undertaken of this nature here on the hill by congressional committees. And I would think that literally thousands of pages of record made even by this House Small Business Committee bearing on that subject would be sufficient to indicate the necessity for the Robinson-Patman Act, and even greater necessity for more effective enforcement of the act.

Mr. CONTE. Wouldn't such a study be an avenue to determine the empirical data that you speak about?

Mr. KINTNER. Oh, yes. I have no objection to that proposal. I think the empirical data can be found, by just studying the case law, at least in favor of Robinson-Patman, because the hard situations that are reflected, the hard illegal situations that are reflected in the case law, abundantly indicate the need for this law.

Now, if you are going to develop evidence on the other side, or try to develop evidence on the other side to show that the law has no utility, then I certainly think a fair inquiry is required, because what we have today are assertions and no data. We do talk with far too little empirical data, whether we are defending the act or kicking the act. And perhaps empirical data is needed.

Mr. CONTE. And this would be one way of getting it?

Mr. KINTNER. This would be one way of getting it.

Mr. CONTE. I have no further questions, Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. I would like, if I may, Mr. Kintner, to discuss with you briefly the per se sections. This has certainly been one of the focal points of the controversy. Would it strike you, sir, that there is here, perhaps, an analogy to a city ordinance on traffic limits. Let us say that the city council in its wisdom had to grapple with the problem of how fast can you go on Elm Street before it endangers life, limb, and property. And, of course, no particular point, 30, 40, or 50 miles an hour makes sense in all circumstances, at all times, under all traffic conditions. Nevertheless, you must comply to let us say, hypothetically 40 miles an hour, and to go faster is illegal. This speed might be very dangerous, indeed, an hour just after school, and it might, arguably, be less than dangerous at 2 a.m. in the morning. But, nonetheless, if you go over 40 miles an hour on Elm Avenue, you are breaking the law, it is a violation. Do you see an analogy in this?

Mr. KINTNER. I think it is an apt analogy, Mr. Potvin. I have tried to point out in my statement that these discriminations in the promotional service allowances, particularly, are typically of short duration, and unless you had a per se approach, or as you call it, the traffic regulation approach, you would never effect corrective action.

Mr. POTVIN. As a practitioner, sir, does it strike you that if the Commission were to attempt to administratively amend the law, so that it was no longer per se, it would then necessarily get into a sometimes illegal stance, and would this not make it most difficult for you in counseling your clients to try to reason whether at all times and in all claims it would be permissible, or whether in some instances it would inflict "substantial economic injury."

Mr. KINTNER. Certainly it is a lot easier to counsel a client when you can tell him that price fixing of any sort is per se illegal than it is to tell him that a rule of reason applies, because then he wants to know, what is the rule of reason, what are the circumstances under which he could do this or that. Therefore, using this analogy, it is a lot easier to tell the man who is developing a promotion, or extending a service, or an allowance, that these are per se provisions of the law, and that what he does for one under 2(d) or 2(e) he must do for all, and that it doesn't matter what the circumstances are. This is what the law says:

Mr. POTVIN. In an observers sort of way, Mr. Kintner, would it be correct to say that one of the reasons for the continuing vitality of the rule of reason approach is that there has not been an attempt to extend it to all areas, that is to say, that if the stretch of a boycott does not require the application of the rule of reason, as you have pointed out, neither does a cold case of price fixing, and so forth?

Would you not feel that it would possibly do irreparable damage to the entire rule of reason approach to try to extend it into areas that have traditionally been per se.

Mr. KINTNER. Yes, indeed.

Along the same line of thinking, I think—I know—that businessmen want predictability. They do not have the time, they are so busy with so many other problems that they do not have the time to predict

a range of legal propositions and apply those to their business. They want a certain amount of certainty, the rules of the road, under which they can operate their business.

And the antitrust laws and the cases ought as much as possible to provide the businessman with predictable, certain rules under which he can operate.

Mr. POTVIN. So that despite the inferences drawn or contentions made by critics of the act, which tend to make the point that most manufacturing sectors of the economy, particularly those of considerable individual unit size, would favor abolition or dilution of the per se sections. Is it not true, sir, that in fact many of these firms would be less than receptive to a change toward unpredictability.

Mr. KINTNER. It has been my experience that the businessman does want as much certainty as he can secure from his counsel on the rules of the—the legal rules—of the road in antitrust. Unfortunately we are operating in the antitrust field in a changing economy, with changing practices, and this certainty is not always possible. But to the extent that one can provide the businessman with rules of the road, with guidelines that are certain, he is advantaged. And this is what he seeks. There is nothing that confuses a businessman more than to find two courts of appeals with contrary decisions. And he then is waiting for the day when the Supreme Court will resolve that, so that he doesn't have to take that chance.

Mr. POTVIN. Mr. Kintner, this entire field, of course, has entered into what most observers regard as a time of evolution, because of two recent decisions, one in which you played a most prominent part. I am referring to the *Meyer* and *Perkins* cases. Would you care to whip out your crystal ball, as it were, and do a quo vadis for the subcommittee, particularly with respect to the comment frequently heard that the Robinson-Patman Act may be heading for a collision with the Sherman Act if you extrapolate out from *Meyer* as interpreted by *Perkins*?

Mr. KINTNER. Well, the *Meyer* case, I think, moved toward a realistic, practical interpretation of the Robinson-Patman Act. Now, this law, like other laws that you gentlemen have passed up here, is sometimes a creature of compromise, and sometimes the language is obscure. And this is what makes lawyers fat and happy. Obscure language creates litigation, and uncertainty in the minds of businessmen, and the lawyers have a field day.

So I would have to admit that the Robinson-Patman Act has been characterized by a great deal of obscure language.

But the Commission and the courts have over the years gone a long way toward interpreting some of these obscure areas of the law, the Robinson-Patman Act. And I think in recent years the Commission and the courts have been quite realistic and practical in arriving at practical solutions, practical applications of the Robinson-Patman Act. And I believe that the *Fred Meyer* decision and later the decision in *Perkins v. Standard Oil* were just such solutions, practical solutions to practical problems.

In *Fred Meyer* the objective of the act, to insure fairness to retailers so that they would receive—Independent retailers would receive—their fair share of promotional allowances—which was certainly one of the objectives of the Robinson-Patman Act—was effectuated by the reasoning of the Supreme Court in that case. And the Trade Commission

has issued what I think is an excellent set of guidelines for promotional allowances in the light of the *Fred Meyer* decision. I think that these guidelines are eminently practical. They are enforceable. They correctly reflect the law. To the extent that there may be any areas of uncertainty, I think they may be susceptible of being ironed out.

As to the *Perkins* case, it simply held that you couldn't create another link in the chain of distribution and thus avoid the effect of the Robinson-Patman Act. And I think that makes good sense, too. It sought to prevent evasion of the basic purpose of the law, just as *Meyer* sought to prevent evasion of the basic purposes of the law. And I think that the business community is getting more certainty in those interpretations, more effective ground rules are being laid down to give the businessman certainty in planning his future conduct.

Mr. POTVIN. Would you conclude that there is a major irony, sir, in the fact that the level of stridency on the part of at least some of the critics has been increasing so greatly at the very time when this commonsense approach, some would say overdue commonsense approach, has been applied in these matters?

Mr. KINTNER. Yes, Mr. Potvin. I have said in the past that Robinson-Patman litigation was very often characterized by the kind of argument characterized as how many angels could rest on the head of a pin. But once the Commission and the courts began to make practical applications of the law, then many of the members of the bar became wrathful and said that the course was all wrong. I don't see that.

Mr. POTVIN. In other words, if it was going to work, now we have to oppose it.

Mr. KINTNER. Well, I am afraid that that attitude has occurred. At the same time I point out that many critics of the Robinson-Patman Act, many informed critics, will never be satisfied as long as the law is on the books. They don't agree with it, or its philosophy. And I yield to them their right to hold this view, just as I hold a contrary view.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Kintner, I wonder if you could state whether you feel that the goal of maintaining free competition could be achieved by limiting the Robinson-Patman Act's application only to situations in which predatory practices were present.

Mr. KINTNER. No; I do not. If you had that limitation you wouldn't need the Robinson-Patman Act. You could approach the problem under the Sherman Act. The Robinson-Patman Act is an incipency statute, just as the Federal Trade Commission Act is an incipency statute. It was meant by the Congress, designed by the Congress, to nip some of these practices in the bud at incipient stages before they reached full blown Sherman Act violations, and incidentally, after the harm had been done, and then you applied criminal penalties.

Mr. ODEN. During these hearings witnesses have criticized the Robinson-Patman Act by claiming that its application results in higher prices to the consumer. Have you found any prohibition in the Robinson-Patman Act against a seller lowering his prices?

Mr. KINTNER. No; I haven't. I know at least one industry where large buyers are able to exact discriminatory prices, and where the small buyers in the industry historically over the years have paid high prices, and almost level high prices, whereas the large buyers in this

particular industry have steadily exacted lower prices. But those lower prices in this industry, in my opinion—and I don't intend to tell the committee which one I think it is, because I don't think it is material to my point—I think that in this particular industry the large buyers are being subsidized by the small buyers. And I think that is both morally and legally wrong.

Mr. ODEN. The subcommittee has heard time and time again that the Robinson-Patman Act is anticonsumer, anticompetitive in itself. And prior witnesses have stated that sporadic secret price discrimination would tend to generally lower prices across the board. **Mr. Kintner**, could you comment on the effect the Robinson-Patman Act actually has regarding price rigidity in the marketplace.

There appears to be a lot of misunderstanding about the application of the act itself.

Mr. KINTNER. I agree with you.

Mr. ODEN. Does the Robinson-Patman Act actually stop a manufacturer or seller from lowering prices, and, thereby, create price rigidity?

Mr. KINTNER. Not in the least. If he thinks his product is overpriced, or if he thinks he can take more business from his competitors by lowering the price, he has a perfect right to do it, and should do so. That is the essence of competition.

Mr. ODEN. I think this is a misunderstanding that many nonlawyers and lawyers who are not familiar with the Robinson-Patman Act have—they feel that the act states that no price reduction can take place, rather than the act talking in proportional equal terms when there is a price reduction.

Mr. KINTNER. In that connection too there are standards and defenses in the law—cost justification, and competitive effects, meeting competition—which permit discrimination.

Mr. ODEN. On an individual basis?

Mr. KINTNER. In individual cases—if it is justified. And I know that businessmen understand these defenses and take advantage of them.

Mr. ODEN. Would you have any reason to believe that the repeal or amendment of the Robinson-Patman Act would have the effect of lowering consumer prices?

Mr. KINTNER. I think that is a fairy tale.

Mr. ODEN. I have no further questions, Mr. Chairman.

Mr. DINGELL. Mr. Kintner, you have had a great deal of experience. Have you any awareness of any set of circumstances where prices have been maintained by the rules set down by the Robinson-Patman Act outlawing price discrimination?

Mr. KINTNER. No, sir; I do not.

Mr. DINGELL. Did you have any instances that came to your attention while you were chairman of the Federal Trade Commission where prices were maintained artificially high as a result of the prohibitions of the Robinson-Patman Act?

Mr. KINTNER. I have been in this field 22 years in and out of Government, and I haven't observed any such instance.

Mr. DINGELL. Would it then be your opinion that prices are not maintained artificially high by reason of the prohibitions of the Robinson-Patman Act against discriminatory pricing practices?

Mr. KINTNER. Yes, sir; I agree.

Mr. DINGELL. Do you have any statement to make to the committee this morning with regard to the level of prices as a result of the requirements of Robinson-Patman?

Mr. KINTNER. I don't think that the Robinson-Patman Act has been responsible for enhancement of price levels in any industry since its passage. I think it has been responsible, even though its enforcement has been somewhat sporadic and painful in the development of the case law, I think it has been responsible—and again I must confess I can't prove this with empirical data—but my best judgment is that the Robinson-Patman Act since its passage has been responsible for the preservation of hundreds of thousands of small businessmen, many of whom today are big businessmen.

Mr. ODEN. I have one more question, Mr. Chairman.

Mr. Kintner, to proceed with this one further step, would you say that the consumer would more than likely be getting his best buy in a market where there are as many competitors operating as the economy would allow?

Mr. KINTNER. Of course.

Mr. ODEN. And what effect do you think a consumer would feel if in an oligopolistic structure the number of competitors was radically altered, lessened?

Mr. KINTNER. Well, the history of monopoly, whether it be monopoly in this country or cartelization abroad, is that where monopoly and cartelization exist, the consumer pays a higher artificially fixed price. And that is true whether it is done by businessmen under monopoly or cartelization, or whether it is done by the Government. It is the consumer who pays and pays because competition is absent.

And if we are to make American capitalism work, we have to preserve this little man, and preserve his right of entry into the marketplace. Because the little man is the innovator. The little man is the one who will take a chance, who will go in with a lower price and try to make it, who will build a better mousetrap.

And if you have an oligopolistic or monopolistic situation in an industry and no little men, no small businessmen, no innovators, no entrants, you have, I think, a rigid industry which has to be characterized by artificially high prices, and in which the consumer suffers.

I think the interests of the consumer, the American consumer, are best served by the preservation of small business. And I believe that the philosophy of fairness in pricing is wholly consistent with the basic antitrust philosophy of preserving competition in the marketplace.

Mr. ODEN. Mr. Kintner, we have also received testimony stating that price discrimination is a tool rarely used in attempting to monopolize a market. I wonder if we could elicit your feelings on that?

Mr. KINTNER. My experience is that price discrimination far too often has been a tool used to eliminate competitors from the marketplace.

Mr. ODEN. In other words, you would say that rather than using the words "rarely used" you would say "frequently used?"

Mr. KINTNER. I would agree with that. I said "far too often," and I would say "frequently."

And there is another side to this coin, Mr. Counsel. Manufacturers find that the Robinson-Patman Act is a shield to them as well as to

the small customer—because many large manufacturers are unable to turn aside the blandishments of their large customers for better prices than are accorded their competitors, because the large customer has, because he is large, much greater leverage in the market place than does the small customer. And so some of our largest corporations have been subject to this kind of leverage. And I suggest that this law not only protects the small businessman who is a customer in an industry, but also protects in many instances the large manufacturer or supplier to that industry.

Mr. ODEN. Thank you, Mr. Kintner.

I have no further questions, Mr. Chairman.

Mr. DINGELL. Mr. Kintner, the Chair again wishes to commend you for your very helpful and very carefully thought out statement. We wish also to commend and thank your associates at the table with you for their presence. Gentlemen, it has been a privilege to have you all before the committee. And we do thank you for your toil and your energy which you have given so richly to the committee.

Mr. KINTNER. It is a privilege, as always, to have been before you, Mr. Chairman.

Mr. DINGELL. Thank you so much.

Our next witness is a distinguished member of the antitrust bar, a practitioner, a scholar, a writer in the field of antitrust law. We are privileged now to have with us Mr. Jerrold G. Van Cise, of the firm of Cahill, Gordon, Sonnett, Reindel & Ohl of New York, Mr. Van Cise, we are privileged to have you with us this morning. If you have anyone with you that you would like to have sit with you at the witness table it would be entirely appropriate.

The Chair does wish to observe that you are here by request and invitation of the committee, that you have not sought the privilege of being here this morning. The Chair also wishes to make it very plain on the record that we are grateful to you for joining with us this morning and giving us the benefit of your wisdom.

The Chair observes that Mr. Potvin, counsel, has advised that you do not have a prepared statement; but you are here to answer such questions as the council now directs to you. For that purpose the Chair now recognizes the counsel for the subcommittee, Mr. Potvin.

Mr. VAN CISE. Thank you, sir.

TESTIMONY OF JERROLD G. VAN CISE, ESQ., NEW YORK, N.Y.

Mr. POTVIN. Mr. Van Cise, would you state whether in your opinion an act controlling price discrimination is necessary within the structure of our antitrust laws?

Mr. VAN CISE. I believe it is, sir, or otherwise small business would disappear in many instances.

My reasons are as follows: A salesman for a large national company has two obligations: (1) to make as many sales as possible (2) with as high a return as possible. He customarily believes that he can best achieve this by discrimination. Accordingly, his natural impulse is, first, to lower the price solely in one territory and to keep it up in other territories. This enables him to return the desired profit by keeping the price up in most of the territories, but to lower the boom in one

particular territory until he gets the additional volume that he wishes, which is usually at the expense of the local seller.

If there was not an act preventing that, many small local sellers would disappear, because big national companies generally would do this.

Second, if this course of action were not possible because legislation dealt with territorial price discrimination, he would turn to the large buyer. He would keep his prices up in sales to most buyers, but he would go to one or two particular large buyers, and offer a lower price to him to get that additional volume. The result would be, the large buyer would get bigger and bigger, and the little companies competing would get smaller and smaller.

In my experience over roughly 35 years I have every week been faced with this problem, either by a salesman for a client wishing to do this, but our client's compliance program prevented it, and we had to say no, or, we have been told of other companies doing this and we are asked how best to meet it.

To repeat, a law of this nature is absolutely vital.

Mr. POTVIN. Mr. Van Cise, do you favor the present Robinson-Patman Act?

Mr. VAN CISE. I favor the act as presently interpreted. Originally when the Commission was experimenting with this act it in effect construed the act to prohibit any price difference, no matter how small and no matter how temporary, even to the extent of condemning absorption of freight to get into distant markets. It also said in effect that the right to meet competition is nonexistent. Today those interpretations have been re-examined and repudiated. And I believe today the act is workable.

It is true, I think I could draft a better law. I am sure you could, a better law. But any new law would have to go through the same process of interpretation, and better the evils we have than those we know not of.

Mr. POTVIN. What improvements do you feel might be made in the act, sir?

Mr. VAN CISE. Three changes, I believe, would be worth considering.

First, cost justification. The salesman who wishes to get increased sales and still maintain his profits should be encouraged to go to large and small accounts alike and work with them, to have them earn a lower price by saving the expenses of the seller in manufacturing, selling, and delivering. At the present time the Commission has so construed the cost justification proviso of the Robinson-Patman Act that the salesman hardly ever does it. It just isn't worthwhile, because there will always be some criticism by the Commission of the averaging, some criticism of sampling. It is such an expensive process today to cost justify successfully that usually it is not attempted.

I wish the Commission would somehow encourage the price discrimination which is cost justified by experimenting with more liberal rules of cost justification. Even if that cost justification results in only a partial justification, at least a half a loaf is better than no bread at all.

Mr. POTVIN. Are you speaking perhaps in part, sir, to the subject of functional discount.

Mr. VAN CISE. Sir, functional discounts are given on the basis of status. The wholesaler is entitled to a lower price than the retailer, not on the basis of saving expenses, but rather on the basis of what is necessary to keep the wholesaler alive in business. The theory of functional discount is, that those on the same competitive level get the same price. It is not based on cost.

Mr. POTVIN. So when you used the phrase "earning the lower price," it was not in the functional discount sense.

Mr. VAN CISE. It was not.

Mr. DINGELL. Mr. Potvin, would you yield?

I am curious here. You appear to be addressing yourself not simply to the question either of volume sales by any individual seller, but rather to a device whereby the whole area of a particular salesman or wholesaler or outlet of the manufacturer would, by increasing the total volume, earn a lower price than perhaps might be available in another outlet area of the same manufacturer. Am I correct in that impression?

Mr. VAN CISE. Not quite so. When a sales program is conceived by a large or small company, there is a recognition that certain accounts could be serviced at a much lower cost if they would take, in, say, carload lots, if they would be willing to order in advance, if they would be willing to take care of the mechanics of breaking and shipping goods from a central warehouse. There are many forms of cost saving. Big buyers do not wish to go to that trouble. They would much prefer to have a lower price and not have to earn it. Small buyers also are guilty of the same. If they can have a lower price without earning it, why not?

Sellers are discouraged from going to buyers and saying, "I will give you a lower price if you will earn it," because the buyer says, "well, if I earn it I will still be clobbered," on the ground that no matter what we do to try set up the proper records, something will always be found that is wrong.

So I wish that we would implement the intent of Congress when they passed the Robinson-Patman Act and put in the cost justification proviso by having the Commission experiment with ways of liberalizing proof of cost justification, in order to give sellers and buyers alike an incentive to earn lower discriminatory prices which in turn benefit the consumer.

Mr. DINGELL. Am I correct in my impression that what you are discussing, then, is an administrative change as opposed to a statutory change?

Mr. VAN CISE. Correct, sir.

Mr. DINGELL. Is this kind of a change possible administratively from the enforcing agency?

Mr. VAN CISE. Correct.

Mr. DINGELL. As a matter of fact, I have the feeling—and I hope you will comment on this—that probably this kind of a program of cost reduction in distribution could probably legally be brought about by a manufacturer or distributor who had the degree of innovation required to initiate a program of this kind. I also have the feeling that once a program of this kind is properly presented to the

agency, the FTC, it probably would not be found to be violative of the law or obnoxious to the agency. Am I correct in this impression?

Mr. VAN CISE. Mr. Chairman, I have had the privilege of working with a number of companies that have worked out cost justification programs which have been successful. But by and large I have found great resistance in industry, because they have seen the record of case after case in which a cost justification program was established and has been thrown out by the Commission on the ground that there was too broad averaging, or on the basis that the sampling was not accurate. There has been a feeling in industry of discouragement. And I would say many companies refuse to do this on the ground that it is a waste of time, a mere boondoggle for accountants and lawyers.

Mr. DINGELL. I am aware of the fact that the Federal Trade Commission has devices like trade regulation rules, and conferences, advisory opinions, and devices of this type. Does it occur to you that one of these mechanisms would be useful in making this mechanism available to distributors, manufacturers, and persons who wish to use it?

Mr. VAN CISE. It would, sir. And I would also heartily recommend that the Commission instruct its accountants to work with the American Institute of certified public accountants to see whether, with the expertise of the accountants in the private field and the accountants in the public field collectively, they could not come out with something more specific, more helpful, more liberal than is presently the practice of the Commission.

Mr. DINGELL. It occurs to me, Mr. Van Cise, that perhaps at some opportunity, which is unfortunately not present at this time, you might be able to make other suggestions to the committee. The time is limited here, and I don't want to unduly intrude into counsel's questions, but I would like to have your suggestions as to the furtherance of the matter that you and I have been discussing, when you find it convenient, and such other comments as you would like to make right now, sir.

Mr. VAN CISE. I would be happy to, sir.

I would like to mention two other possible improvements. The second is, the per se approach of (c), (d) and (e), results in a flood of minor violations. Particularly with the addition of the mechanical perfection required under Fred Meyer, it is exceedingly difficult for any seller not to violate (d) or (e). It would be very helpful if you would have "where the effect may be" test, applied to (c), (d) and (e), so that the Commission is not faced with thousands upon thousands of minor violations which they have to proceed against or ignore, violations that are called to their attention. If you wish the Commission to concentrate on substantial violations of the Robinson-Patman Act, relieve them of the necessity of going after any lack of perfection.

Mr. DINGELL. Are you suggesting an administrative change?

Mr. VAN CISE. No, this is a legislative change. I would recommend that the present defenses which are applicable to (a), if they are sound—and I believe they are—should also be applicable to (c), (d), and (e).

Mr. DINGELL. Would you wish to make those suggestions in written form to this subcommittee.

Mr. VAN CISE. I would be glad to, sir. But you have them already in the "where the effect may be" clause and the provisos in (a), plus

the proviso embodied in (b), and if those are merely applied to (c), (e), and (d), you have the answer.

Mr. DINGELL. I see.

Mr. VAN CISE. The third improvement is a change which is under way with the Commission, but which I wish to stress should be implemented. That is the industrywide approach to enforcement of the Robinson-Patman Act.

When a company is sued by the Federal Trade Commission for violations of the Robinson-Patman Act, it must vigorously defend that suit, it must delay as much as possible, it must use every procedural device to postpone even an inevitable order, because it will be at a competitive disadvantage with others in the industry who may well be doing the same thing. If the Commission would make a preliminary analysis as to whether or not a practice is widespread or is engaged in by only one company in industry, and if it is widespread, would call an industrywide hearing, would, as a result of such a hearing formulate guides or rules as to what the Commission considers to be violations and what would be a lawful type of price difference, and would thereafter require each member in the industry as of, say, 60 days thereafter in the future to report whether or not he has conformed to the new rule, I think you would have a much more effective enforcement of the Robinson-Patman Act than going after individual guinea pigs.

I wish to stress that, while guides alone are useful, guides implemented with section 6 reports as to whether or not you are conforming to the guides are far better. Those industry reports must be accurate, or it is a criminal offense, and a company does not willingly lie in submitting those reports. If the reports reveal a violation you can pick out the few companies that are wilfully, knowingly refusing to conform to the guides, and hale them into court. In this way you can clean up all industry by going industry by industry with this approach.

Mr. DINGELL. Are you suggesting in the recommendation you are now discussing with the committee a legislative or administrative change?

Mr. VAN CISE. This is an administrative procedure which is being experimented with by the Commission in fields other than Robinson-Patman Act, with one shortcoming. There are no teeth. This procedure is not implemented by section 6 reports. And I wish to suggest that this be used in the Robinson-Patman Act area, but implemented by section 6 reports which should be filed by everyone in the industry.

Mr. DINGELL. It occurs to me that perhaps we ought to take a look at the other things that are being done without the requirement of section 6 reports. Would you want to list to the committee just very briefly the other sections of law that are being utilized without section 6. We might bring this to the attention of the FTC, too.

Mr. VAN CISE. You have the Fred Meyer guide, of course, under the Robinson-Patman Act, which explains how the Commission interprets that act. But there are no teeth in it. It merely says, be good boys. You have special guides or rules with respect to warranties, or with respect to a form of advertising. But these are merely informative, with no teeth. And the boys with the white hats obey, and those with the black hats do not. And what we need to have is information

with a club. And the best way to have a club is to require industry by industry a report under oath which requires each competitor to reveal what it is doing, and if it is violating, it must admit to violation. If it admits to violation, it means this company does not agree with the Commission, and believes that there is an issue, so take it into court.

Those are my three suggestions, sir.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Van Cise, would you state whether you feel that the Robinson-Patman Act is or is not inconsistent with Sherman Act.

Mr. VAN CISE. Not inconsistent in the slightest. When it was first interpreted it was. It prohibited any form of price variation. It prohibited meeting of competition. It was in effect nullifying the Sherman Act. Today with the flexibility that exists it is not.

But I will go one step further. If you did not have the Robinson-Patman Act or an act like this, the little businessman would disappear in industry after industry. Congress would not sit still and let our major industries run only by two's or three's. Legislation controlling those industries would be instituted in the form of licensing, in the form of regulation, and in that way the Sherman Act would be nullified. In my humble opinion the Robinson-Patman Act is the savior of the Sherman Act.

Mr. POTVIN. Indeed, could it not be said that you have characterized it as even more than that, perhaps as the savior of a free society?

Mr. VAN CISE. Correct, sir.

Mr. POTVIN. The licensing and regulation that you outlined sounded frighteningly fascist, I suppose.

Mr. VAN CISE. Yes, sir.

Mr. POTVIN. Therefore, you feel that in order to have a truly free economy something very like the Robinson-Patman Act is an essential element.

Mr. VAN CISE. You stated it very well.

Mr. POTVIN. One of the matters that we had perhaps the most controversy, depth of feeling, and passion on is this question relating the act to the consumer interest. I think that you heard Congressman Conte's reading of the excerpt from a recent edition of the Washington Post, which is somewhat typical of assertions that are made. Would you comment on this?

Mr. VAN CISE. We are now dealing with opinion rather than fact. But in my opinion the repeal of the Robinson-Patman Act would not change prices upward, downward, or sidewise. The only effect that such a repeal might have would be to prevent an industry which is engaging in a price fixing conspiracy from being able to put the blame on the Robinson-Patman Act.

I will go further. I believe that without the Robinson-Patman Act or some similar act protecting small businessmen there would be far fewer sellers in most of our industries. The fewer the sellers, the less likelihood of someone taking a chance and cutting prices or innovating.

Accordingly, in the long run I believe that a law like the Robinson-Patman Act insures that prices will be established in a manner to protect the consumer.

Mr. DINGELL. Are you saying competitively?

Mr. VAN CISE. I would say it insures competition, and therefore insures that the prices to consumers will be established on a competitive basis.

But I will go one step further. Even if the consumer had to pay higher prices in order to have small businessmen—which I don't believe is true—it is worth the price. Without small businessmen we would only have big businessmen, and we would only have big unions, we would have big government, and our economy would not be what it is today.

MR. POTVIN. Mr. Van Cise, you are, I am sure, familiar with the text of the three recent reports on the Federal Trade Commission, the Neal, Stigler, and ABA reports.

MR. VAN CISE. Yes, sir.

MR. POTVIN. I would like to ask this question as to all three, but particularly with respect to the ABA report, concerning the various criticisms made therein of the Federal Trade Commission.

MR. VAN CISE. First, the caliber of the Federal Trade Commission staff by and large is excellent. They do not have the duty as in the Department of Justice to determine whether or not there has been a violation of a criminal statute, which is the Sherman Act, and if there is such a criminal statute, to go out, hale the offender in, and with flags flying, do their best to see that justice is done. Rather, the Federal Trade Commission staff has the duty imposed upon it by President Wilson to be fair to business, to find out if there is or is not a violation of a noncriminal statute, and to proceed through the administrative process to see that both pro and con are presented.

It is a type of painstaking analysis of the facts and development of new law. And the Commission by trying to be fair is slow. But I think that when we are dealing with practices, as to what is unfair, what is deceptive, what may be injurious, the Commission should go slow. And all we are doing in criticizing the Commission staff is to criticize them for doing what they should do. If they attempted to give industry the rush act, you would have far greater complaints and many more tasks to perform.

That is my first point.

As to the Commission itself, I wish to pay tribute to the courage of the Commission. Ever since the Commission was organized, until recently, the Commission has thought that the only way that it could function was to be a pale copy of the Department of Justice, to try to proceed solely by litigation. Well, gentlemen, when you are dealing with price discrimination, misleading advertising, all of the many thousands of practices which are under the jurisdiction of the Federal Trade Commission, you cannot possibly deal with them solely by the litigation approach, all you can do then is to have as many suits as possible, and play the numbers game, and the result is, you have nothing.

First under Mr. Kintner, and then with Chairman Dixon and the present group, there was an attempt to reappraise the role of the Federal Trade Commission, and it came to a realization that mere litigation was not the answer. Accordingly, it has deliberately slowed down litigation. And instead it has tried voluntary persuasion, it has tried rules, it has tried guides. It has abandoned the absurd old type of trade practice conference rules, which are merely a bunch of boiler-plate. And because they have been experimenting through trial and error, there have not been as much law suits. And the private bar has not been as profitably employed. But I think the public has benefited

by this. And to have the Commission criticized for doing what took a lot of courage to do—

Mr. DINGELL. And innovation, the Chairman observes.

Mr. VAN CISE. Correct—makes me very disturbed. I am not attacking the motives of anyone in signing or drafting these task reports. I am merely saying, on the basis of my personal observation of both the staff and the Commissioners, I think they are doing a very commendable job, of which we all should be proud.

Mr. DINGELL. May I allude to the dates when the Commission was founded. At the time of the founding of the Commission, my recollection is that the Congress was faced with a very difficult problem. They had the antitrust laws which were sort of working. They had the difficult problem of establishing new rules, of trying to inventory extremely complex conditions and understand extremely complex circumstances, something which was, in the opinion of the Congress in the time available, as I understand it, beyond the capacity of the Congress. They set up a commission which the Congress felt would have very broad powers to go into broad questions, to analyze economic problems, to analyze discrimination problems, to analyze competitive problems, to analyze economic problems, and economic forces, and things of this kind. This Commission, which reshuffled, was expected to proceed, as I understand, quite differently than did the Department of Justice, simply by the initiation of litigation. Am I correct in my understanding?

Mr. VAN CISE. You are correct.

And if I may I would like to pay tribute to a little New England Yankee who taught me everything I know, Thurlow Gordon. He was with the Department of Justice under President Taft. He was borrowed by the Federal Trade Commission as one of its first attorneys for a year to help set up this Commission. As a result of that experience, having been in both agencies, he taught me that the future of antitrust was not in the Department, but in the Federal Trade Commission. His reasoning was that the Department of Justice was absolutely essential to take care of monopolization, hard-core cases, situations where businessmen ought to go to jail.

But in the development of the law as to exclusive dealing, with respect to discrimination, with respect to advertising, this required a sympathetic understanding of the problems both of business and of the public, and to work out rules in a different environment. And he taught me that on all occasions to stand up for the Federal Trade Commission if they were doing that job. And the reason I am here today is because of the lessons that were taught to me by him.

Mr. DINGELL. Are you saying, then, that the Justice Department would handle cases following rather routine, well established patterns in the law. Whereas the Federal Trade Commission would go into the innovation, the investigation, the economic studies, the philosophical type of approach. The difference would be one between the engineer and the basic researcher. Is that the sort of analogy that you are seeking here, sir?

Mr. VAN CISE. Assistant Attorney General McLaren would have a squad to hale me in if I ever accused him of only bringing routine cases.

May I rephrase it by saying, the Department of Justice is supposed to go after basic structural problems, wilfull violations—in other words, it is supposed to be the watch dog over these aspects of our antitrust laws which are so serious that violators merit fines and jail. The Commission is supposed to look into the frontiers of business practices, protection of small business, and protection of the consumer. This is an entirely different problem. We need both agencies, because they are looking in different directions, although they fit together into one unified whole. But each has a complementary job.

Mr. DINGELL. I see.

Mr. POTVIN. Mr. Van Cise, I think you have really covered rather thoroughly what I had anticipated would be my final question, which would have spoken to the oft heard criticism of the slow down by the Commission.

Are there any other points that you would like to mention?

Mr. VAN CISE. I would just like to toss one other bouquet. I have on many, many occasions been given very rough treatment by attorneys in the Federal Trade Commission who did not agree with my view of the facts or law. But that discomfort has always been alleviated by the most charming set of secretaries that I have seen anywhere. And may I pay that tribute as long as I am throwing bouquets?

Mr. DINGELL. Mr. Wertheimer.

Mr. WERTHEIMER. No questions.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. No questions.

Mr. DINGELL. Mr. Van Cise, the committee is deeply appreciative of your presence and of your time and of your very helpful testimony. We thank you so much.

Mr. VAN CISE. Thank you, sir.

Mr. DINGELL. If there is no further business to come before the committee at this time, the committee will stand adjourned until 2 o'clock today.

(Whereupon, at 12 noon, the subcommittee was recessed to reconvene at 2 p.m. the same day.)

AFTERNOON SESSION

Mr. DINGELL. The subcommittee will come to order.

This is a continuation of the Committee on Small Business, Subcommittees on Small Business and the Robinson-Patman Act.

The first witness is Mr. Joseph Kolodny, managing director of the National Association of Tobacco Distributors.

Mr. Kolodny, we thank you for your presence here.

Do you have a prepared statement?

Mr. KOLODNY. Yes.

Mr. DINGELL. Would you identify yourself fully to the reporter for the purposes of the record?

And we would be happy to recognize you for such statement as you wish to give.

**TESTIMONY OF JOSEPH KOLODNY, MANAGING DIRECTOR,
NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS**

Mr. KOLODNY. My name is Joseph Kolodny. I am managing director of the National Association of Tobacco Distributors, whose membership serves over a million retail outlets throughout the United States with tobacco, confectionery, and a vast number of related products. In the main, these retail outlets comprise small independent businessmen who in word and deed characterize the freedom of opportunity to exercise the initiative to embark on a business venture to "succeed or bust." The existence of this multitude of independent entrepreneurs is, to a large degree, attributable to the Robinson-Patman Act.

Inasmuch as the Federal Trade Commission is the agency principally charged by Congress with the administration and enforcement of the Robinson-Patman Act, it is quite appropriate that we succinctly draw a graphic picture of the status of our competitive economy prior and subsequent to the enactment of that law. Having been fortunate to be personally identified with our marketing economy in both the pre and post Robinson-Patman Act phases, I regard myself as reasonably well equipped to confront the subject on concrete and realistic terms.

Prior to the promulgation of the law prohibiting price discrimination and other unfair competitive practices in connection with distribution, the congressional archives were replete with statistical data showing that secret rebates and other unfair practices—yielding millions of dollars annually to its practitioners—were engaged in an unconscionable, unbridled, reckless, and immoral fashion. As a consequence, hundreds of thousands of small manufacturers, wholesalers, and retailers operated in those days in an unwholesome climate of isolation and despair which led not only to unnecessary bankruptcies in prodigious numbers but also, in too many cases to disgrace and suicide.

It is not only difficult, but virtually impossible, for a new generation to contemplate, even remotely, the pernicious circumstances and destructive influences that pervaded our economy at that time. Yet the record is clear and recollection of survivors of that period, such as myself, is still fresh. A loaf of bread which cost the private entrepreneur 21 cents was sold by the same supplier to the beneficiary of secret rebates for 18 cents, and sometimes as little as 17 cents. While the independent retail dealer acquired a package of cigarettes from the supplier for 19 cents, the identical package of cigarettes was acquired by the recipient of secret rebates for as little as 17 cents and, as a weekend special two packs for 30 cents. Electrical appliance units carrying a \$25 price at retail, which the retailer purchased at \$18, was sold to the retailer's large-scale competitors at \$13 a unit. Advertising allowances were granted to giant chainstores but were denied to their smaller competitors. In the year preceding the passage of the Robinson-Patman Act, one large-scale manufacturer of groceries granted almost \$300,000 of such advertising allowances to one grocery chain, \$45,000 to another grocery chain, and nothing at all to their independent competitors. Many of these large-scale retail dealers coerced unearned brokerage allowances from their suppliers where no brokerage function was actually performed.

Although no such allowances were paid to their competitors, in the year prior to the enactment of the Robinson-Patman Act, the A. & P. chain alone received unearned brokerage allowances in excess of \$2,500,000. Price discrimination, as indicated by the examples given above was rampant. The large buyers would receive prices so low in comparison with the prices charged to their smaller competitors that one court was forced to conclude, on the basis of the facts there presented, that :

Whatever the system used or by whatever name designated, A&P always wound up with a buying price advantage. This price advantage given A&P by the suppliers was, it is fairly inferable, not "twice blessed" like the quality of mercy that "droppeth as the gentle rain from heaven." Only A&P was blessed, and the supplier had to make his profit out of his other customers at higher prices . . . (U.S. vs N.Y. Great Atlantic & Pacific Tea Company, 170 Fed 2nd at 83).

The foregoing example is taken at random from the plethora of facts and statistics built up by private and government research on marketplace competitive disadvantages prior to the advent of the Robinson-Patman Act. Among many such studies, I would merely like to cite such standard works as Zorn and Feldman, "Business Under the New Price Laws" (Central Book Co., Inc., 1958); Fulda, the Antitrust Laws" (Central Book Company, Inc., 1958); Fulda, "Food Distribution in the United States" (1951) 99 U.P.L.R. 1051 et seq.; as well as materials developed both by the Temporary National Economy Conference (TNEC) in its monographs and the Federal Trade Commission itself in its hearings and investigations.

It was with the suddenness of a thunderbolt that, promptly upon the heels of the enactment of the Robinson-Patman Act, hopelessness was transformed into hopefulness, discouragement into encouragement, torpor into a resolute intention on the part of innumerable small businessmen to continue in business and to transmit to their offspring and survivors the business enterprise which the new law gave hope of perpetuation.

This is not to say that the passage of the Robinson-Patman Act transformed our economy, it did give promise of relief from business practices which translated themselves into bankruptcies throughout the length and breadth of this Nation during the darkest days of the worst depression of this century. Even prior to the Robinson-Patman Act, these vulpine practices had been to some extent inhibited by certain features of the Code of Fair Practice promulgated under the authority of the National Industrial Recovery Act. It was the function of the Robinson-Patman Act to rescue and pressure those salutary and constitutional aspects of the NRA and to discard the dross and defects of that legislation which had caused it to be declared unconstitutional by the U.S. Supreme Court.

Is the Robinson-Patman Act an ideal piece of legislation? Not by any means. It has its share of loopholes and incongruities and has suffered serious harm as a result of judicial and administrative misinterpretation. But, and it is a very significant but, despite its shortcomings, it has rendered an inestimable service in the preservation of our competitive economic system.

The industry which I represent, comprising several thousand wholesale distributors who provide service to over one and one-half million retail outlets throughout the Nation would, candidly regard it as a disaster if this statute were undermined either by legislative or admin-

istrative act. On the basis of more than a generation of experience with the Robinson-Patman Act, we would recommend legislation not to dilute its impact but to strengthen its original purpose. We have gone on record in the past, and do so once again this day, in favor of a number of strengthening amendments.

We call for the enactment of legislation which would make it clear that a functional discount is mandatory where the seller restricts the number of potential customers but, nevertheless, sells to different functional classes.

We also favor legislation clearly establishing the fact that territorial franchises do not violate any of the antitrust laws where the product franchised is in free and open competition with other products of like grade and quality.

We favor extension of the concept of the antitrust laws of the United States to include section 3 of the Robinson-Patman Act so as to allow aggrieved private parties to bring suit for treble damages for violation of this vital section of the law.

We approve the interpretation given to the Robinson-Patman Act by the Supreme Court in *Fred Meyer Inc. v. FTC* (390 U.S. 341) and in *Perkins v. Standard Oil of California* (395 U.S. 642). Such cases establish a healthy trend in the direction of greater and more realistic viability for the Robinson-Patman Act.

It is in the light of the purposes and intent of the Robinson-Patman Act that the Federal Trade Commission must be judged. Ever since the inception of that law, the challenging tasks of its administration and enforcement has been entrusted to the Commission. It is on the basis of its work in this area, work duplicated by no other Federal agency, that the Commission must be evaluated. To say that the Commission may not have been as effective or forceful as it might is to beg the basic question: What other agency is available to effectuate the mandate of that legislation which is the principal buttress of independent small business?

Obviously, our association has had a spate of confrontations with the Federal Trade Commission. Its rulings have sometimes pleased us and, on other occasions, displeased us. In essence, however, it is our belief that the Federal Trade Commission has, under trying and often impossible circumstances, delivered a constructive and fruitful performance in the administration of the antiprice discrimination law and has, thereby, aided and abetted the growth and preservation of the American free competitive system. We, therefore, strongly urge that the powers of the Commission be enhanced, not diminished; its budget increased, and its mandate expanded so that it may continue to perform the singular service which it renders to our economy.

Mr. DINGELL. Mr. Kolodny, the committee is grateful to you for a most helpful and informative statement, and the time that you certainly took to prepare that very fine statement.

Mr. Conte.

Mr. CONTE. I don't have any questions.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Kolodny, one of the questions that continues to arise is as to the interplay between the Robinson-Patman Act and the consumer interest. Could you tell us from your actual long and varied experience within your industry what you feel the effect, if any, of

the Robinson-Patman Act is on the ultimate price to the consumer?

Mr. KOLODNY. The consumer invariably is a beneficiary when prices are stabilized. He doesn't benefit when there is predatory price cut competition in the market, because, as the late and very much revered Judge Learned Hand pointed out in the *United States v. The Great Atlantic & Pacific Tea Co.*:

Cutthroat competition is a weapon by which the large firm deprives its smaller rivals of business, after which the price cutter is able to establish a monopoly in its trading agent.

Therefore anything which tends to stabilize price benefits the consumer.

Mr. POTVIN. Mr. Kolodny, as I understand, confining our questioning now to just cigarettes, which is one of the staples of the members of your association, that these are available to wholesalers throughout the country at this time only on a delivered price basis, is that correct?

Mr. KOLODNY. Yes.

Mr. POTVIN. And the major tobacco manufacturers, so to speak, refuse to deal on any other basis, is that correct?

Mr. KOLODNY. That is correct.

Mr. POTVIN. Now, does this refusal to deal perhaps constitute a restraint of trade in this sense? Most of your members are also wholesalers, for example, of candy, is that correct?

Now, I discussed this matter with your most able executive director in Washington, Mr. Beatty. I know that when he was a wholesaler in the Southwest, he would send a truck to Chicago—having arranged for a backhaul, and in most cases where he couldn't the trucker did—and pick up candy at the Chicago manufacturer and truck it down to New Mexico, thereby increasing his profit. Would the fact that this is not available to your members, because of this refusal to deal in any other manner than delivered price, deprive them of an available option here?

Mr. KOLODNY. I think it is a very profound question. We are unreservedly in accord with prepaid delivered prices, for four specific reasons:

No. 1, it tends to put competition on an equal level. It simplifies operations, circumventing the pyramiding of paperwork. It buttresses fair competition in the marketplace. Any other method would tend to undermine the competitive position of the smaller businessman versus the larger competitor.

Mr. POTVIN. How does that work as a practical matter, Mr. Kolodny? Let's play the tape two different ways here. Let's say that you have a wholesaler in Philadelphia, and one in, let us say, Denver, rather disparate.

Mr. KOLODNY. Even California.

Mr. POTVIN. Or, if you will, Los Angeles. So that we have quite a contrast from the distance from the factory, which would be typically Virginia and North Carolina. Would the delivered price be the same in Philadelphia as in San Francisco?

Mr. KOLODNY. As far as the acquisition of the merchandise is concerned, yes. It may cost the manufacturer more money to deliver it. But the acquisition of the product is identical in Los Angeles and Denver and Philadelphia.

Mr. POTVIN. Your answer would be yes, the price to your member is the same wherever he lives in the country.

Mr. KOLODNY. That is right, yes. And that tends for stabilization of competitor levels.

Mr. POTVIN. How long has this policy been in practice in your industry, sir?

Mr. KOLODNY. To the best of my knowledge, it has existed since 1911.

Mr. POTVIN. And it has operated to your knowledge at least without interruption since that time?

Mr. KOLODNY. I believe with gratifying success, yes.

Mr. POTVIN. As far as you know, this would be the practice of all major cigarette manufacturers?

Mr. KOLODNY. Yes.

Mr. POTVIN. As I understand, cigars do not operate the same way.

Mr. KOLODNY. Cigars are also prepaid shipments.

Mr. POTVIN. By all manufacturers?

Mr. KOLODNY. By all manufacturers.

Mr. POTVIN. I see, sir.

That is all I have.

Thank you.

Mr. DINGELL. Mr. Kolodny, we are deeply appreciative of your presence.

Mr. KOLODNY. Thank you.

Mr. DINGELL. Thank you so much.

Our next witness is Mr. Cornelius Kennedy, a member of the administrative law section of the American Bar Association.

Mr. Kennedy, we are certainly happy to welcome you here today for such testimony as you choose to give.

TESTIMONY OF CORNELIUS KENNEDY, ESQ., MEMBER, ADMINISTRATIVE LAW SECTION, AMERICAN BAR ASSOCIATION

Mr. KENNEDY. Mr. Chairman and members of the subcommittee, it is a great personal pleasure for me to appear before you today in connection with these hearings because I have long had a deep appreciation for the work which this committee has done, and is doing, to focus attention on critical problems relating to the manner in which Federal agencies carry out congressional policy, and thus, in a very real sense, the manner in which those agencies meet the public needs.

For over a decade now, I have been associated with efforts to improve the practices and procedures by which the Federal agencies operate. These practices and procedures are often critical in determining the degree to which the Federal agencies meet the congressional goal and the public needs. During this period, I have served as chairman of the committee on uniform rules of practice and procedure of the administrative law section of the American Bar Association, as a member of the council of that section, as chairman of the Administrative Law Committee of the Federal Bar Association, and as a member of the staff of the subcommittee of the Senate Committee on the Judiciary dealing with administrative agency practices and procedures. And I also served as an alternate congressional delegate to the Administrative Conference of the United States in 1961-62 and I am presently chairman of the Liaison Committee of the American

Bar Association with the permanent Administrative Conference of the United States. While I draw on all of these experiences in forming my opinions, I am, of course, appearing here today in my private capacity, and not as a representative of any of these organizations.

Perhaps I should add that in the case of each of these organizations in which I have participated, the viewpoints of the administrative agencies generally have been very effectively represented and the public positions in this area of the organizations on which I have served reflect the input of their viewpoints and the give and take which is necessary in the effort to reach a consensus.

The hearings today relate to the enforcement of the antitrust laws. These laws deal with a public policy which has been developed over many, many years to encourage the highest possible degree of competition in the marketplace. The alternative might be for the public to be limited to what could become the tyranny of no competition.

Now, we deal with that type of tyranny basically in two ways:

One, by a substitution of other goods and services in an effort to get back to practical competition, and in another way, by regulating a monopoly. But except in the case of the natural monopolies, we try to preserve competition.

Now, how do we do it? We try, first of all, by a system of suits by the Federal Government to correct specific acts of wrongful conduct. We try, in another way, to make it possible to have private suits, the best known of which are the treble damage suits. Our third approach has been the creation of an administrative agency like the Federal Trade Commission to deal with the problem of anticompetitive acts. It is with this third alternative that we have our greatest difficulties.

And it is the concern over those difficulties which is the subject of these hearings.

The Federal Trade Commission was created so that it would not be necessary for the Government to always act as an enforcer in a court proceeding against specific wrongful conduct. It was also created so that it would not be necessary for the private citizen to always bear the full burden of protecting himself against anticompetitive acts. It was created to be, in the words of some, a body of knowledgeable people (they call it expertise), and if that body of knowledgeable people had reason to believe that an unfair method of competition or unfavorable act was being used in commerce, and if it should appear to them that action to stop it would be in the public interest, then they were to initiate a proceeding to stop it. And further this Commission was given the power to do this within its own house, without going to court, through the power of a cease and desist order.

In addition, the Commission was given the duty to proceed against unlawful acts specifically described by the Congress. Admittedly, the agency is limited in its ability to do all this by funds, manpower and many other very real factors. Thus, it becomes a question of agency discretion as to whether or not it will devote its resources to a particular anticompetitive act.

We come then, to the first of three problems, which an agency like the Federal Trade Commission has caused. The first is that a person sometimes feels that because the Federal Trade Commission cannot be compelled to take his case, he is left without a remedy. Now, if he goes into court, the court must take his case. The court cannot

say it will not accept the filing of a complaint, because it has a heavy load of cases. A person has a right to have his case heard.

Furthermore, the U.S. attorney has no real discretion in whether or not to prosecute for a violation of the Federal statutes. There are exceptions, such as waiving prosecution in order to obtain testimony, and where age and other factors make prosecution unwarranted. But basically he has no discretion. I just reread the basic statute on the duties of the U.S. attorney this week.

Now, this is not basically true with respect to an agency like the Federal Trade Commission. A person who feels he has been injured can take his case to the agency, but he cannot compel the agency to take it and carry it forward, even if that was the primary purpose for which the agency was created by the Congress.

The agency generally makes the excuse of workload in such situations. A part of that workload, they say, grows out of the fact that they as agency members must be responsible for all of the decisions of the agency. However, a solution to that is, of course, a delegation of power and authority within the agency. But that delegation of power cannot be effectual without an adequate statement of agency policies to guide those to whom the duties are delegated.

Thus, we come to a solution which I think will be common throughout the three problem areas which I discuss. Unless there is an adequate public statement of agency policies, agency staffs do not know in which areas they should turn for the bringing of complaints and they do not know the standard upon which they should judge a particular complaint of the public. The hearing examiner has no adequate body of agency policy before him which he can use in determining the result in a given case. And the agency on review has no adequate standards. The American Bar Association and other professional organizations have long urged an amendment of the Administrative Procedures Act to require both a greater amount and more specific policymaking by the agencies.

In this regard, with respect to the certiorari type review proposals made by President Kennedy at the beginning of his administration, legislation was proposed in the Senate Judiciary Committee that agency review of hearing examiners' decisions on certiorari should be limited, among other situations, to where the hearing examiners' decision was contrary to announced agency rules and policy decisions.

The second type of problem which a failure of the agencies to engage in adequate rulemaking has brought to the fore is the fact that it makes oversight by Congress almost impossible. The administrative agencies, the major ones, are properly called arms of the Congress. And yet because they proceed on an ad hoc basis in the conduct of their efforts in the area which has been given to them by the Congress, it robs the Congress of the ability to exercise effective oversight. All Congress has before it is what you might call an amorphous mass of agency actions.

Mr. DINGELL. Mostly on an ad hoc basis.

Mr. KENNEDY. Mostly on an ad hoc basis. And you cannot find the thread in any short period of time in order to be able to exercise effective oversight. I think the members of this committee are well aware of that in many areas.

Again, the solution is a requirement that the agencies concentrate more on the making and announcing of rules and policies.

The third problem area which I will raise again points to the same solution, I believe. It is a conceptual problem. We have traditionally in this country divided our functions of government into three branches in order to have a fair and effective government, instead of the old phrase of the King, "the State, it is I," instead, we have the legislative, the executive, and the judicial decisions.

In essence, when we are dealing with anticompetitive situations, it is up to the legislative branch to define the wrongful conduct, the executive to prosecute it, and the judicial to judge the case.

Now, this system has proved a very workable system in our country. But when we combine those three functions into one administrative agency, we have serious problems, which have been recognized and debated at length.

I received in the mail yesterday an announcement of a regular February meeting of the District of Columbia Bar Association. The topic for that evening meeting is going to be "Should prosecutors write agency opinions? The role of agency counsel in decision making."

It is the kind of problem which Judge Friendly discussed in his treatise on the Federal administrative agencies, the need for a better definition of standards. He said at page 5—this book, incidentally, is a compilation of lectures which he gave at Harvard Law School.

The thesis presented is this:

A prime source of justified dissatisfaction with the type of Federal administrative action which I will shortly specify is the failure to develop standards sufficiently definite to permit decisions to be fairly predictable, and the reasons for them to be understood. This failure can and must be remedied.

He goes on to point out that the failures have been at times failures by the agency to sharpen the vague contours of the original congressional statute, failures by the legislature to supply more definite standards, and failures by the executive to spur the legislature into activities.

All these failures, he says, have been interdependent, "Failure by the agency to make clear what it is doing impedes both executive challenging and legislative response.

Mr. DINGELL. Mr. Kennedy, I wonder if there are some other parts of the publication to which you referred that you would like to insert in the record. If that be so, permission will be afforded you to do so at a later time, and the record will be open for a certain period to afford you an opportunity to so do.

Mr. KENNEDY. I appreciate that. I think there are other passages in his book that would be helpful to the subcommittee.

Now, the whole thesis of Judge Friendly's approach is this need for announced policymaking by the agencies. We in this country would be in a most uneasy state of mind if the Congress were merely to say that something is wrong in the antitrust field, and tell the courts to go ahead and solve it. We rely almost completely on a fair degree of legislative specificity as to what is wrong, and then a process of enforcement. As long as we have separate branches of our Government, we have been forced to take the necessary steps. When those functions are rolled together, there is no longer that compulsion, and the agencies have to an alarming degree under the excuse of workload adopted the

ad hoc approach of putting out a fire here and putting out a fire there without any comprehensive statement of their general policies.

Mr. DINGELL. Of course, Mr. Kennedy, this is a matter that the Chair has been extremely critical of over the years. I think you put this in a very neat, very effective, and very clear fashion. I think that your comments today are uniquely appropriate, for example, to the Federal Communications Commission. I suspect they would be very much appropriate to the ICC if the ICC were still functioning, which unfortunately it is not. I am satisfied that there are other Government agencies to which these comments are appropriately addressed such as the CAB, and many other agencies in this town.

Mr. WERTHEIMER. Mr. Chairman, along that point, isn't the general thrust of your comments, Mr. Kennedy, in effect aimed at the whole Federal agency procedure? It doesn't single out the Federal Trade Commission, really, does it?

Mr. KENNEDY. No, my comments relate to all of the major regulatory agencies, as they are called. They suffer to a greater or lesser degree from the failure to make rules, and they have all been criticized. Dean Landis presented his report to President-elect Kennedy back in the fall of 1960, and he was very critical of the agencies almost across the board on this ground of failure to provide policies, because it made it impossible to have adequate and effective agency administration within the agency as well as creating a problem for the general public.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. KENNEDY. Now, I have appeared on any number of panels and in any number of meetings. The constant agency answer to proposals that they engage in greater rulemaking is this problem of work load, the problem of administering the laws which are given to them to administer.

But let me put the answer to their contention this way. If we had wrongful conduct or conduct which people may think is wrongful, it can continue in this country under our three branch system until such time as the Congress declares that specific conduct to be unlawful. We do not as a country under our form of government want to rush in and correct conduct without fully deliberative procedures resulting in legislative rules. The agencies, however, sometimes feel that speed is more important than the deliberative process and use the ad hoc approach.

The agencies also argue that they can not specify all of the types of conduct which are unlawful. That may be in many situations more of an excuse than a valid reason because the problem is to first specify what is unlawful and to then enforce it. There is just no excuse to proceed on the ad hoc basis.

The agencies, lastly, seem to fear that their policies, if they announced them, may be unpopular. Yet, the members of this committee must face the public every 2 years, which is considerably more often than the members of the administrative agencies must face the question of reappointment.

Therefore the fact that rulemaking is difficult just should not be an excuse. It is time consuming, but to the extent that it expedites the general operation of the agency by permitting effective delegation, it will accomplish a far greater net result in the public interest than the ad

hoc approach upon which the agencies base their actions, where they have this latitude.

And thus, Mr. Chairman, and members of this special subcommittee, it is my thought that a very substantial portion of the problems which concern this committee today might be obviated if the provisions of the Administrative Procedure Act were amended as recommended by the American Bar Association and other groups to require increased rulemaking action by the various Federal administrative agencies, and that this would be a major step forward in achieving the type of performance and goals which the Congress envisioned when it created these agencies.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Kennedy, if an old friend and admirer might be permitted a slight digression, let me say that it is gratuitous to say that you are better at the typewriter than at the tiller. An excellent analysis, certainly.

This morning we were favored with an appearance by, first of all, a former Chairman of the Federal Trade Commission, Earl Kintner, and an eminent antitrust practitioner from New York, Jerrold Van Cise. Each of them in his own way discusses the contrast between the industry wide approach as opposed to the case by case approach which roughly equates with the two parts of the contrast you have just depicted.

Mr. KENNEDY. That is correct.

Mr. POTVIN. Mr. Van Cise, after lauding the courage, the innovative foresight of the Commission, stated that he felt that in the long run if order is to prevail, that even more emphasis must be placed on the industry wide approach, and one supposes relatively less emphasis on the case-by-case approach. Would you tend to agree with that?

Mr. KENNEDY. I would very much agree with the fact that only when you get away from the case-by-case approach can the basic question of fairness and the basic question of oversight be adequately dealt with so that the public will have confidence in the work of the agencies, and that they will work effectively.

Mr. POTVIN. It would appear, then, that the so-called numbers game, the ability to cite figures showing the number of cases, the number of orders entered, and that type of thing, would not be a particularly apt indicator of the effectiveness of the work of an administrative agency.

Mr. KENNEDY. The one way in which the numbers are an indication of the effectiveness of an administrative agency is in its backlog.

Mr. DINGELL. Would you yield, Mr. Potvin.

Mr. POTVIN. Yes.

Mr. DINGELL. If this business of citing the number of cases decided were to be the measure of effectiveness, I have reason to think that the ICC and the FCC would probably be regarded as the most efficient agencies in this or any other governmental institution, am I correct.

Mr. KENNEDY. Yes, you are, Mr. Chairman.

Mr. DINGELL. Because the volume and the flow of cases going through these agencies probably exceeds and surpasses that going through any regulatory agencies anywhere. Yet, in terms of real accomplishment, these two agencies probably rank as among the sorriest in Government, and in terms of establishment of policy, and in terms of correcting

evils, and in terms of appropriate allocation of resources, and in terms of achieving a lasting and a unified and a cohesive and intelligent policy, they have to my knowledge and to the knowledge of most other people in Washington, accomplished precisely nothing, at least during the 15 years I have served in Congress.

Mr. KENNEDY. It is very true that the best agency record of all would be an agency which had no cases because it so clearly defined the area of the law which was within its province that everybody could comply with it if they wanted to. Generally, the more specific the law is, the more general the compliance. It is in these gray areas that the people try to find a line to walk down, which is a tended one.

Mr. DINGELL. Actually what you are saying here is that these agencies have a threefold responsibility, a legislative responsibility, a judicial responsibility, and an executive responsibility. I suspect you will tell us on this committee that many of the agencies excel, or at least produce most of their labors in the quasi-judicial field, am I correct?

Mr. KENNEDY. That is correct.

Mr. DINGELL. There is altogether too little work in the legislative end of the business, so that the rules whereby people might conduct themselves are not available on an industrywide or nationwide basis, is that correct?

Mr. KENNEDY. That is correct. And that is the thesis of Judge Friendly in his treatise on the need for better definition of standards.

Mr. DINGELL. And perhaps a reapportionment of resources.

Mr. KENNEDY. Most of the agencies could look well at that question.

Mr. DINGELL. Thank you.

Mr. POTVIN.

Mr. POTVIN. Mr. Kennedy, in other words, we might say this. The point here, then, is that in terms of statistics one innovative, well fashioned industrywide order might well outweigh scores and scores of individual case-by-case statistics.

Mr. KENNEDY. Yes. A good and reasonably specific industrywide order would form a standard against which people could measure their own conduct, it would form a standard against which the Congress and the public would judge the effectiveness of the agency, and it would provide a sense of fairness—it would provide a measure by which the public could judge the fairness of the agency procedures.

Mr. POTVIN. One of the areas of controversy that the subcommittee has had before it is the so-called per se sections, sections (c), (d), and (e), of the Robinson-Patman Act. Would you care to comment on the interplay, in a conceptual way, between what happens when an agency is given a mandate of the Congress, and nondiscriminatory per se violation, if you violate it you are breaking the law type of thing, and then show the interplay between that and what you have said on standards.

Mr. KENNEDY. I am glad you asked that question. That was the reason I mentioned my analogy of the U.S. attorney. His function is to enforce the laws of the United States, to prosecute violations. And his basic statute gives him no alternatives such as whether or not he wants to redefine the crime so that an act is not a crime.

To the extent that agencies have the function of defining the crime, and also the function of enforcing so-called per se statutes, they have frequently apparently retreated behind the allocation-of-resources ar-

gument as an excuse for exercising one function or the other, or neither, depending upon who is analyzing the problem. If they were required to be as specific in their rulemaking in those areas where the Congress has given them the power to make more specific a broad grant of quasi-legislative authority, then the Congress and the public would be better able to judge whether they were proceeding effectively via the per se route, or by the more discretionary authority vested in them.

Mr. POTVIN. An agency given a mandate by the Congress in the form of per se legislation is literally without further legislative authority as regards that narrow aspect of the statute, is it not?

Mr. KENNEDY. That is correct, by the definition you have placed on it.

Mr. POTVIN. So that the per se portion would be without or extrinsic to the analysis you have made as to the legislative and other functions.

Mr. KENNEDY. That is correct.

Mr. POTVIN. That is all, Mr. Chairman.

Thank you.

Mr. DINGELL. Mr. Conte.

Mr. CONTE. No questions.

Mr. DINGELL. Mr. Wertheimer.

Mr. WERTHEIMER. On that point, though, isn't the agency limited in capacity by the amount of resources it has available to it to enforce its overall programs?

Mr. KENNEDY. That is right, it is limited. And to the extent the Congress has given the agency the choice, so to speak, of proceeding one way or the other, as long as the agency can use the ad hoc approach—

Mr. WERTHEIMER. But when you say choice, are you talking about the cold, hard choice, the choice of how you are going to use your money to carry out the various assigned functions of the agency?

Mr. KENNEDY. That is the agency's answer to the Congress when it has been given the dual function.

Mr. WERTHEIMER. Do you think there is any legitimacy to that?

Mr. KENNEDY. I find it hard to defend the agency in that kind of a situation.

Mr. WERTHEIMER. I don't understand what you mean. I am not asking you to defend the agency. Do you feel there is any legitimacy to the argument that the amount of resources available have to determine in the long run just how much an agency can do and where its emphasis will go and that to carry out the full mandate of its responsibilities in each and every area would take the agency far beyond its resources?

Mr. KENNEDY. My feeling there, Mr. Wertheimer, is precisely the reaction that I have to the dilemma of the courts when they must take all cases filed. They have no choice in the matter. I can recall after the second world war in the Federal courts, in Chicago, in the Northern district of Illinois, with which I am personally familiar, that the district court there was just deluged with Federal rent overcharge cases, cases for \$9, \$10, \$15, which were consuming an immense amount of time of both the U.S. attorney's personnel, as well as of the court. There was no alternative. They were per se violations. And they were

prosecuted. If the workload got too great, and they backed up, then it was the Congress's responsibility to provide the funds, and be able to focus on the problem.

Mr. WERTHEIMER. Along those same lines, then, this kind of argument would not be in your opinion a sufficient basis for saying, for example, that the commission, is not carrying out a much broader range of consumer protection activities because of the fact that it doesn't have the resources needed to do this?

Mr. KENNEDY. I do not think lack of resources is any answer that can be satisfactorily given.

Mr. WERTHEIMER. One other question. The Freedom of Information Act theoretically was passed to deal with a lot of the problems you have been discussing here. Do you feel that it has been successful in carrying out this purpose?

Mr. KENNEDY. The studies which have been done on the effectiveness of that act by committees of the American Bar Association, with which I am familiar, indicate that a number of the agencies are making some effort to comply, and that a number of them are making as much effort as possible to retain the greatest amount of flexibility. Again, they come to the ad hoc or the flexibility argument as a reason for not complying with what the Congress thought was the spirit of the Freedom of Information Act.

Actually the act is section 3 of the old Administrative Procedures Act. That was merely the public information section, it was not the section which required the making of rules. The intent at one point in the bill which the Senate passed and which the House did not consider would have amended both of those sections, the freedom of information section more or less along the line in which it was passed, and the rulemaking section to require a greater amount of rulemaking—I should say both the rulemaking and decision sections.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Kennedy, I don't believe you were here this morning when Mr. Van Cise testified.

Mr. KENNEDY. No, I was not.

Mr. ODEN. There is a direct correlation between what you have been saying and his statement this morning regarding the work of the Commission. And for approximately the last 45 years the Commission has been approaching the enforcement of its statutes on more or less a case by case or ad hoc approach. And Mr. Van Cise commented that during the chairmanship of Paul Rand Dixon the Federal Trade Commission assumed a different approach, developed a procedure for promulgating trade regulation rules, and moved more into industry guidance. He suggested that even in the Robinson-Patman Act enforcement that they follow the same type of industry guidance. Would you agree with Mr. Van Cise's conclusions?

Mr. KENNEDY. As you have stated them, I certainly would think that that was a desirable approach.

Mr. ODEN. Do you notice any definite improvement since the Commission moved to a trade regulation and industry guide type approach and earlier when they were moving on an ad hoc case-by-case approach?

Mr. KENNEDY. I want to express a lack of current familiarity with the Commission's activity on that point. I couldn't really adequately compare them.

Mr. ODEN. You are familiar, though, with the fact that they are now working with trade regulation rules and are promulgating them?

Mr. KENNEDY. Yes, I am familiar with that. But what effect it has had I just can't say.

Mr. ODEN. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Kennedy, you have covered a number of points that are matters of great personal concern to me. Is it your opinion that the policy of these Federal regulatory agencies is being made by the Bureau of the Budget through allocation of resources, or not?

Mr. KENNEDY. That is a big question, Mr. Chairman, I think an answer must be that these agencies, in commenting on legislative proposals, for example, to the Congress, always wind up with the statement that the Bureau of the Budget has no objection, or has specified objections, to their presenting such comments.

Mr. DINGELL. As a matter of fact, these statements to the Congress with regard to legislation here must be cleared through the Bureau of the Budget?

Mr. KENNEDY. That is correct.

Mr. DINGELL. Now, if these are arms of Congress I view this as wrong. If they are not arms of the Congress and are arms of the executive it may be well that that is proper, I don't know. What is your judgment? Is this proper or not.

Mr. KENNEDY. If it is proper, it is proper only in the sense that it is filling a vacuum.

Mr. DINGELL. Let me treat on another matter. The Bureau of the Budget controls the number of employees they can put—let's take the FTC—on flammable fabrics. It may give them more or less than the number required on antitrust or Robinson-Patman, it may give them more or less or the precise number. Do you view the fact that they ask, as proper?

Mr. KENNEDY. Mr. Chairman, as you well know, I believe that the Congress is the ultimate policy body in the Government.

Mr. DINGELL. In this we are in agreement.

Mr. KENNEDY. And I believe that the executive branch through the Bureau of the Budget can only act in this area, to the extent that the Congress permits it to, by either failing to act or by providing an area of leeway.

Mr. DINGELL. Let me allude to another circumstance. Here we have a situation where questionnaires and things of this kind, investigations, oftentimes must be cleared with the Bureau of the Budget before the agency begins this investigation. Do you regard that as a proper matter?

Mr. KENNEDY. I believe the Congress can by statute require or permit an agency to do anything it wants.

Mr. DINGELL. Now, let's go beyond this. We have again the situation—

Mr. KENNEDY. Let me just say, so long as it is within the framework of the Constitution.

Mr. DINGELL. On this we are also in agreement.

Let me just allude to another situation. The Congress very rarely understands what the requests of the agencies are—I am referring to the independent agencies now—we only know what they send up here well muffled, well filtered, and well colored by the Bureau of the Budget. Now, is that really a situation which reflects the existence of an independent agency, or an arm of the Congress, or is that a situation which reflects the existence of an agency that has been taken over and lost its own policymaking vitality and has essentially become a part of the executive department, in open defiance of Congress, and in open defiance of the law?

Mr. KENNEDY. You are aware, I am sure, Mr. Chairman, that the Government Organization Manual, I believe it is called, in the explanation of the functions of the various components of our Government now lists the so-called arms of Congress as part of the executive branch.

Mr. DINGELL. That is a matter which greatly outrages me, and I think should outrage the Congress, but unfortunately it doesn't seem to do so.

Mr. KENNEDY. I might say, Mr. Chairman, on this general point, that much of the problem might well be tackled, again, by my theme of rulemaking, because the failure of the Congress, or the failure of the agency, let me put it that way, to make specific rules has in a sense made it difficult for the Congress to exercise the kind of oversight that it has in mind, and also to judge whether the allocation of resources is proper or not.

Mr. DINGELL. We literally have no way of ascertaining fully what the wishes or needs or attitudes of these agencies are. I tend with regard to this investigation to try to find out what the needs and wishes of the FTC happen to be, to try to find out not only if there is fault here—and I have heard many charges made, and I have heard them also rebutted with considerable vigor and effectiveness—but also to find out, if there be default here, whose fault it happens to be, whether, the fault lies with the executive or with the Congress or with the agency itself. There are some other things I intend to comment on with some force when the report of this subcommittee is filed.

Mr. Oden.

Mr. ODEN. Mr. Kennedy, in your statement you referred to the fact that often independent regulatory agencies in their zeal for enforcement have moved too fast into an area with reckless abandon.

Mr. KENNEDY. No: I didn't put it that way. I said that they rush in to correct a situation on an ad hoc basis before they have gone through the deliberative process that the Congress forces itself to go through to pass a law of general applicability.

Mr. ODEN. It is interesting that you said that, because again Mr. Van Cise this morning rebutted one of the criticisms of the Federal Trade Commission; that it moves too slow in its enforcement procedures. And he referred to the fact that the Department of Justice is more the prosecutor in antitrust, and that the Federal Trade Commission was created by Congress to be an innovator and experiment with different solutions for solving antitrust problems, and to go in to analytical and economic research to find out what problems there are in the economy. He stated that one of the attributes of the Commission was the fact that it didn't leap into some situation before it examined it carefully, since they were making law rather than apply clearcut criminal statutes that are on the books.

And I would assume that you would agree that as a whole the regulatory agencies are there to filter out. With the large legislative power that Congress grants them that many times is not very definite in its scope they have a definite responsibility to be careful where they tread.

Mr. KENNEDY. They have an extremely significant responsibility to be careful, and to base their action on a thoughtful consideration of the problem. One of the best disciplines in the world for doing that is the requirement that the action be based upon a rule, a policy of general applicability, rather than moving against some particular person.

Mr. ODEN. And I would assume that you would hope that the Commission would continue this industry guidance and rulemaking procedure that it has developed in the last 10 years, and expand upon it.

Mr. KENNEDY. It will certainly provide a much better approach.

Mr. ODEN. Thank you.

I have no further question, Mr. Chairman.

Mr. DINGELL. Thank you very much, Mr. Kennedy.

We are most appreciative of your very helpful statement.

(The following submission was ordered to be inserted in the record at this point:)

A New Approach to Delegation

(By KENNETH CULP DAVIS†)

The non-delegation doctrine is almost a complete failure. It has not prevented the delegation of legislative power. Nor has it accomplished its later purpose of assuring that delegated power will be guided by meaningful standards. More importantly, it has failed to provide needed protection against unnecessary and uncontrolled discretionary power. The time has come for the courts to acknowledge that the non-delegation doctrine is unsatisfactory and to invent better ways to protect against arbitrary administrative power.

The non-delegation doctrine can and should be altered to turn it into an effective and useful judicial tool. Its purpose should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards; its purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power. The focus should no longer be exclusively on standards; it should be on the totality of protections against arbitrariness, including both safeguards and standards. The key should no longer be statutory words; it should be the protections the administrators in fact provide, irrespective of what the statutes say or fail to say. The focus of judicial inquiries thus should shift from statutory standards to administrative safeguards and administrative standards. As soon as that shift is accomplished, the protections should grow beyond the non-delegation doctrine to a much broader requirement, judicially enforced, that as far as is practicable administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules. The requirement should extend not only to delegated power but also to undelegated power, including especially the extremely important power of selective enforcement, which probably engenders more injustice than delegated power but which has always been almost altogether beyond the reach of the non-delegation doctrine and of all other judicial doctrine designed to prevent or check arbitrariness.

The proposed changes are sweeping ones, for they will involve the

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courts in new and difficult undertakings. But the proposals are deeply conservative in that they are designed to enlarge the judicial function of protecting private parties against injustice. In the entire legal and governmental system, the strongest need and the greatest promise for improving the quality of justice to individual parties are in the areas where decisions necessarily depend largely on discretion. In those areas the role of the courts has been deficient. The essence of the proposed changes is correction of the deficiency.

What follows is a discussion of (1) the failure of the non-delegation doctrine, (2) three recent cases of major administrative policy-making without meaningful statutory guidance, (3) why the non-delegation doctrine has failed, (4) judicial acquiescence in administrative exercise of ungranted power, without safeguards or standards, and in contravention of legislative intent, (5) how to alter the non-delegation doctrine to make it effective and useful, and (6) the future—non-delegation, due process, and common law.

I. THE FAILURE OF THE NON-DELEGATION DOCTRINE

The original purpose of the non-delegation doctrine was to prevent the delegation of legislative power. As recently as 1932 the Supreme Court declared: "That the legislative power of Congress cannot be delegated is, of course, clear."¹ With only a little realism the Court could have said that for a century and a half it had been, of course, clear that legislative power of Congress could be delegated and that it often had been delegated. Delegated power was then being exercised throughout the government. What was shortly to become the huge Code of Federal Regulations was obviously a product of delegated legislative power.

The 1932 statement was an anachronistic statement of an earlier attitude. The later purpose, already well along in its life cycle, was to require meaningful standards when power was delegated: "Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard."² The doctrine has clearly failed to accomplish this later purpose. For instance, when a lower court faithfully applied the Supreme Court's supposed requirement of meaningful standards to a statute which was wholly empty of standards even

¹ *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932). This article does not undertake a systematic statement of the law of delegation. For that, see I K.C. DAVIS, *ADMINISTRATIVE LAW TREATISE* ch. 2, §§ 2.01-16 (1958, Supp. 1965). Beyond the scope of the present discussion is the combination of the non-delegation doctrine with other principles, such as those growing out of the first amendment, as in *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

² *United States v. Chicago, Mil., St. P. & P.R.R.*, 282 U.S. 311, 324 (1931).

though administrators were imposing a death sentence on a sizable business, the Supreme Court reversed, *without pretending to find statutory standards.*³ The Supreme Court apparently knew that an insistence upon meaningful statutory standards was no longer feasible.

II. THREE RECENT CASES OF MAJOR ADMINISTRATIVE POLICY-MAKING WITHOUT MEANINGFUL STATUTORY GUIDANCE

The failure of the non-delegation doctrine can best be seen in cases that do not directly deal with delegation problems. *Major* governmental policy is often administratively made without significant statutory guidance. Perhaps three hundred cases could be summarized to show the existence of this phenomenon. Three outstanding ones have been selected, each of which shows exercise of regulatory power over a vital subject matter of large dimensions, even though Congress at the time of the enactment knew nothing of the subject and could have had no intent of any kind with respect to it. In each of the three cases the whole policy of the government on the particular subject was made by the agency without guidance from Congress.

The three cases are *United States v. Southwestern Cable Co.*,⁴ upholding the Federal Communications Commission's CATV regulations, *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway*,⁵ upholding the Interstate Commerce Commission's "piggy-back" regulations, and *Permian Basin Area Rate Cases*,⁶ upholding the Federal Power Commission's area price fixing for natural gas.

The *Southwestern Cable* case upheld the FCC's regulation of CATV

³ *Fahey v. Mallonee*, 332 U.S. 245 (1947), *rev'd* 68 F. Supp. 418 (S.D. Cal. 1946). Even at an early time, delegations without standards were sustained. *St. Louis, Iron Mountain & S. Ry. v. Taylor*, 210 U.S. 281 (1908); *McKinley v. United States*, 249 U.S. 397 (1919). The Immigration and Nationality Act contains scores of delegations of discretionary power, most of them without standards of any kind. 8 U.S.C. §§ 1101-1503 (1964). So do many other statutes.

An argument that the non-delegation doctrine must be deemed successful because nearly all delegations are in fact accompanied by standards or clarification of legislative purpose is unconvincing because the reason that legislative bodies usually state standards or clarify their purpose is that they choose to govern to that extent, not that the non-delegation doctrine so requires. The test of success or failure of the non-delegation doctrine is what happens when the legislative body is unable or unwilling to state standards or to clarify its purpose.

For an excellent presentation of the view, here rejected, that presence or absence of standards is and should be the crucial consideration on all problems of delegation, see *Merrill, Standards—A Safeguard for the Exercise of Delegated Power*, 47 NEB. L. REV. 469 (1968).

⁴ 392 U.S. 157 (1968).

⁵ 387 U.S. 397 (1967).

⁶ 390 U.S. 747 (1968).

(community antenna television), which did not exist when the Communications Act was enacted in 1934. The Commission during the early period of CATV took the position that it had no power to regulate it, and unsuccessfully sought a congressional grant of authority. Then, beginning in 1960, it gradually asserted authority to regulate, and it finally issued elaborate rules, pursuant to which it issued an order restricting expansion of a particular CATV service. The Ninth Circuit struck down the order on the ground that the Commission lacked authority to regulate CATV, but the Supreme Court unanimously reversed. The Court found the necessary authority in a provision that the Act was applicable to "all interstate and foreign communication by wire or radio,"⁷ and in a requirement that the Commission endeavor to "make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service,"⁸ even though the Court granted that "Certainly Congress could not in 1934 have foreseen the development of community antenna television systems."⁹

Addressing itself to the scope of the Commission's authority, the Court said the authority to regulate CATV was "restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting. The Commission may, for these purposes, issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' 47 U. S. C. § 303(r)."¹⁰

The reality seems abundantly clear that the Commission has power to regulate CATV in any reasonable way it finds to be in the public interest. The resulting law stems from the Commission, not from Congress and not from the courts, except that congressional committees may supervise and the courts may keep the Commission within constitutional and statutory limitations. The congressional power has been effectively delegated to the Commission, without meaningful standards.

A half-hearted argument by Southwestern Cable that "the attempted delegation is unconstitutional for lack of standards"¹¹ was not even mentioned by the Court. The argument apparently was deemed so lacking in merit as not even to deserve a judicial statement that it was rejected.

⁷ 392 U.S. at 167.

⁸ *Id.*

⁹ *Id.* at 172.

¹⁰ *Id.* at 178.

¹¹ Brief for Respondents at 36, 392 U.S. 157.

The *American Trucking* case dealt with the ICC's regulation of the "piggyback" system (trailer on flatcar). The Commission's policy for twenty-five years had been to interpret the Interstate Commerce Act and Motor Carrier Act as withholding power to require railroads to carry the trailers or containers of their competitors, the motor carriers. During that period the ICC unsuccessfully sought authorization from Congress so to require. Then the Commission assumed the necessary power and issued comprehensive rules. The Court held, with seemingly the greatest of ease, that the Commission had the necessary authority, including the authority to change its position. The Court declared that "we agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice."¹²

Of course, Congress had not laid down meaningful standards to guide the regulation of "piggyback" service, for Congress had not even dealt with that subject. But the Court held that the National Transportation Policy was "the yardstick by which the correctness of the Commission's actions will be measured."¹³ The result is that the system must be "fair and impartial"¹⁴ and must be "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."¹⁵ Within that exceedingly broad framework, the whole policy with respect to "piggyback" service has to come from the Commission, not at all from the statutes.

The *Permian Basin* case is even more impressive in showing that the most vital administrative determinations may be made without meaningful statutory guidance. From the time the Natural Gas Act was enacted in 1938, the Federal Power Commission assumed that it had no authority to regulate sales by independent producers to interstate pipelines. But the Supreme Court held in *Phillips Petroleum Co. v. Wisconsin*,¹⁶ that the Commission had such authority, and the Commission then tried to regulate under what the Court in the *Permian* opinion called "an ill-suited statute."¹⁷ The traditional system of regulation of individual companies under a costs-of-service standard proved unworkable. Then, with no statutory guides other than the term "just and reasonable," the Commission in 1960 started a program of fixing maximum rates for each of the major producing areas. The statute contained

¹² 387 U.S. at 416.

¹³ *Id.* at 421.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 347 U.S. 672 (1954).

¹⁷ 390 U.S. at 756.

nothing about area rate fixing. The entire system had to be created by the Commission. The Court held that area rate fixing was not inconsistent with the statute, that it was constitutional, that the rate structure adopted by the Commission was valid, and that the Commission's action was valid in other challenged particulars. The Court sensibly emphasized that "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties."¹⁸ The Court even explicitly acknowledged that "neither law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders."¹⁹ The Court went on to create its own law as to the criteria for review—whether the Commission abused or exceeded its authority, whether each of the order's essential elements was supported by substantial evidence, and "whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable."²⁰ If the statute lacks the criteria for area rate regulation, the Commission must invent them, and the Court will then invent the guides for judicial review of what the Commission establishes! Despite the silence of the statute on issue after issue, the Court's 101-page opinion is filled with such conclusions as "we are constrained to hold that this was a permissible exercise of the Commission's discretion."²¹

The basic approach of the Court was to make the overall judgment that Congress intended comprehensive regulation of natural gas, and then to reason from that judgment to the conclusion that area rate regulation must have been authorized. This approach became explicit on one point when the Court declared: "We are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes."²² That this proposition reaches beyond the natural gas field is shown by the Court's quotation of it in its *Southwestern Cable* opinion to sustain the CATV regulations.²³ Essentially the same thought was expressed in the "piggyback" case: "In the absence of congressional direction, there is no basis for denying to the

¹⁸ *Id.* at 790.

¹⁹ *Id.*

²⁰ *Id.* at 792.

²¹ *Id.* at 798.

²² *Id.* at 780.

²³ 392 U.S. at 177.

ICC the power to allocate and regulate transportation that partakes of both elements [rail and truck]”²⁴

Of course, even though in each of the three cases no power over the specific subject matter had been expressly delegated, and even though no meaningful standards were applicable to the specific subject matter in any of the three instances, still the established framework of regularized procedural protections and judicial review was necessarily a major force in each of the three cases. Within such a framework, the exercise of delegated power on vital subjects without meaningful standards may be good government. At all events, the Supreme Court shows very clearly that it thinks it is.

III. WHY THE NON-DELEGATION DOCTRINE HAS FAILED

The original objective of preventing the delegation of legislative power and the later objective of requiring every delegation to be accompanied by meaningful statutory standards had to fail, should have failed, and did fail.

The courts should never have aimed at either objective. Not only is delegation without meaningful standards a necessity for today's governments at all levels but such delegation has been deemed a necessity from the time the United States was founded, as anyone can quickly confirm by examining the statutes enacted by the 1st Congress, which was made up largely of the same men who wrote the Constitution. The 1st Congress did not bother with standards when it delegated to the courts the power “to make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States,”²⁵ when it delegated to district courts power to impose “whipping, not exceeding thirty stripes,” without a guiding standard,²⁶ when it provided for military pensions “under such regulations as the President of the United States may direct,”²⁷ when it authorized the President to fix the pay, not more than prescribed maxima, for military personnel wounded or disabled in the line of duty,²⁸ when it conferred discretionary power upon the Secretary of the Treasury to mitigate or remit fines and forfeitures in designated circumstances, without requiring him to mitigate or remit.²⁹ Nor did the 1st Congress define the

²⁴ 387 U.S. at 421.

²⁵ Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

²⁶ *Id.* at 77.

²⁷ Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95.

²⁸ Act of April 30, 1790, ch. 10, § 11, 1 Stat. 119, 121.

²⁹ Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123.

word "proper" in authorizing superintendents to license "any proper person" to engage in trade or intercourse with the Indian tribes; it provided no standard to guide the President in providing that such superintendents "shall be governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe."³⁰

Of course, today's governmental undertakings are much more complex and the need for delegated power without meaningful standards is much more compelling. A modern regulatory agency would probably be an impossibility if power could not be delegated with vague standards. Typically, a regulatory agency must decide many *major* questions that could not have been anticipated at the time of the statutory enactment; typically, legislators are unable to write meaningful standards that will be helpful in answering such major questions; and typically, the protections lie much less in standards than in frameworks of procedural safeguards plus executive, legislative, or judicial checks.

The main facts about any regulatory agency can be used to illustrate what has just been said. Let us choose the Civil Aeronautics Act of 1938, as modified by the Federal Aviation Act of 1958.³¹ Congress left open the fundamental problem of the extent to which competition should be allowed or required, by directing the Board to "consider," among other items, "competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."³² The statutory words did not answer the question whether or when to allow monopoly, whether or when to certificate two carriers for one route, or whether or when to certificate more than two.

Congress also left open many other *major* questions of policy. A mere listing of samples of such questions will show how much discretionary power was necessarily conferred upon the Board: Of the eleven domestic trunklines, the big four at first had about 70 per cent of the business; should they be further strengthened or should the smaller trunklines be strengthened? Should new trunklines be allowed entry, or should all major routes be divided among the existing eleven? Should trunklines be allowed to provide local service? Should they be required to? Should the Board compel service which a carrier does not voluntarily provide? Should local-service lines be allowed to compete with trunklines? Should the service of local-service lines and of trunk-

³⁰ Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137.

³¹ 49 U.S.C. §§ 1301-1542 (1964).

³² *Id.* § 1302(a).

lines be kept separate or should it be mixed? Should certificates for local-service lines be for limited periods only or should they be permanent? Should all-cargo carriers be certificated to compete with the trunklines which carry cargo? Should all-cargo carriers be eligible for subsidies? Should they be authorized to carry mail? Should the all-cargo carriers have the exclusive right to sell "blocked space" (reduced rates for specified space for designated periods)? Should nonscheduled carriers be exempt from regulation? Can an unregulated system of nonscheduled carriers be made compatible with a regulated system of scheduled carriers? What activities should be classified as nonscheduled? What consolidations, mergers, and acquisitions of control are "consistent with the public interest"? What are the factors that should determine what transfers of certificates of convenience and necessity are in the public interest? In the statutory system of basing air mail pay on "need" of the carrier, does a carrier's profit from sale of a route reduce its "need"? Does profit from nontransportation service reduce a carrier's "need"? In finding "need," what rate of return on investment should be allowed? To what extent may mail pay rates be made retroactive? Should mail rates be of two kinds—a rate based on "need," and a rate based on cost of service when subsidy is inappropriate? When two or more carriers of mail between two cities have different rates, may the Post Office Department allocate mail to the carrier whose rates are lowest, or must the Board make the mail rates the same for carriers whose "need" differs? May the Board fix mail rates for classes of carriers or must the rates be fixed for each carrier separately? In what circumstances should the Board fix minimum rates to check competition which causes operating losses? When may promotional or developmental rates below the cost of service be justified? Should the rate base be actual investment or cost of reproduction? Should the rate of return be the same for fixing mail pay as for fixing fares? Can fares be varied so as to stabilize annual earnings? If the fare level is fixed on the basis of earnings of the whole industry, should high-cost carriers receive mail subsidies or should they raise fares on noncompetitive lines above the industry level?

The foregoing questions do seem to involve *major* policy. Yet Congress in the statute gave no clear answer to any of these questions. Statutory provisions and legislative history have some bearing on many of the questions but in no instance enough to foreclose administrative discretion.

The reason for committing *major* policy questions to the Board's discretion was that someone had to answer them, the courts were ill-equipped to do so, and Congress was neither equipped nor willing. A

statute requiring judges to make regulatory policies would probably unconstitutionally violate the principle of separation of powers. Although Congress could not conceivably anticipate all the major policy questions, it could conceivably legislate on each question as it arose. But Congress has neither time nor inclination for that. As for time, Congress during 1938 enacted public laws filling 1,258 pages of the statutes at large, and the provisions on air carrier economic regulation fill only 18 pages; Congress or its committees considered ten or twenty times as much proposed legislation that was not enacted. As for inclination, should any authority other than the electorate try to require Congress to legislate in greater detail than it is inclined to? The degree of delegation should depend upon legislative appraisals of the need for delegation and of comparative qualifications of legislators and administrators. Even the Internal Revenue Code, said to be our most detailed federal legislation, contains more than a thousand express delegations, and through vague or inadequate language perhaps thousands more.

Staffs attached to committees of Congress could conceivably do all that the CAB and its staff now do, and everything that is done could be put through the legislative mill, so that all policies would be determined by statutory enactments. Even if such a system were feasible for one or a few fields of governmental activity, it could not be feasible for all. An individual congressman could not possibly follow even the general nature of more than a tiny portion of all the discretionary action now taken by more than 2,500,000 federal civilian employees.

IV. JUDICIAL ACQUIESCENCE IN ADMINISTRATIVE EXERCISE OF UNGRANTED POWER, WITHOUT SAFEGUARDS OR STANDARDS, AND IN CONTRAVENTION OF LEGISLATIVE INTENT

Extremely incongruous is the non-delegation doctrine when placed alongside a dominant feature of the American legal system—the prevalence of the ungranted and usually uncontrolled power of selective enforcement. The courts keep repeating and repeating that the exercise of delegated power must be guided by meaningful safeguards even when the delegated power is carefully circumscribed and even when the intent to delegate is based upon a fully-considered judgment that the delegation is necessary and desirable, but at the same time the same courts acquiesce in the assumption by police, prosecutors, regulatory agencies, licensing agencies, and other administrators of the enormous power of selective enforcement, which is (a) not only unguided by statutory standards but often exercised in direct violation of clearly expressed legislative intent, (b) typically unguided even by

administrative standards, (c) typically unprotected by procedural safeguards, (d) typically exercised by subordinate officers with little or no supervision, and (e) typically immune to judicial review even when denial of equal justice can be readily shown.

The discretionary power to enforce or not to enforce is one of the most crucial powers of all, even though it is typically unprotected either by standards or by safeguards or by judicial review. When the evidence against a potential respondent is clear, the choice of the enforcement officer to act or not to act may be the only one that counts, because a decision to enforce may almost automatically lead to application of sanctions, and a decision not to enforce is likely to be final for it is likely to be neither administratively nor judicially reviewable.

Yet the discretionary power to enforce or not to enforce seems to be of little or no concern to the courts, which characteristically acquiesce when a prosecutor fully enforces one statute, never enforces a second statute, and picks and chooses in enforcing a third. The courts have no concern for either standards or safeguards when such agencies as the Antitrust Division and the Federal Trade Commission enforce some facets of the antitrust laws but not others; they may even prosecute for slight violations and let the serious ones go. No requirement of standards or of safeguards or of equal justice prevents the Antitrust Division from moving against one conglomerate because of its reciprocity power and undue concentration, while doing nothing about a half-dozen much larger conglomerates with greater reciprocity power and more concentration. And the courts even seem to be indifferent to the denial of equal protection when the police capriciously arrest one out of six violators, even if he can prove that he is the one of the six who is least deserving of arrest.

Such power to enforce or not to enforce is not limited to prosecutors and police. A state public service commission or a federal regulatory agency may institute a proceeding against Company X for a rate reduction but not against Company Y, and the crucial determination may be protected neither by standards nor by safeguards. Similarly, a licensing agency may reprimand a big violator but institute revocation proceedings against a small one. A public housing manager may overlook offenses by some tenants but quickly move to evict others. Administrators of many other kinds exercise the largely unnecessary and mostly uncontrolled power of selective enforcement.

The kind of injustice that is easiest to identify as injustice may be unequal treatment of like cases, or treatment of one whose offense is greater more favorably than one whose offense is less. For instance, if A is much more deserving of prosecution than B, if carrying out the

legislative will clearly requires the prosecution of A, and if equal justice is flagrantly violated by prosecuting B and letting A go, the prosecuting agencies, under the established system in which the courts customarily acquiesce, are nevertheless typically free to prosecute B but not A. The failure to prosecute A is not a defense in B's case, even if the denial of equal justice is flagrant, even if it is motivated by political or personal or other ulterior influence, and even if the failure to prosecute A is in direct contravention of what the legislative body clearly intended. Typically, the discretionary determination to prosecute B but not A is unguided by standards and unprotected by safeguards, and yet it is almost always judicially unreviewable.³³ Neither the non-delegation doctrine nor any other doctrine will help B, even though the power has been arbitrarily exercised, even though B has been denied equal justice, even though no statutory or other standards guide the determination to prosecute B but not A, and even though the discretionary determination is wholly unprotected by procedural or other safeguards.

What a queer system in which (a) the judges in hundreds of opinions keep paying lip service to the proposition that delegations of power are unlawful unless guided by meaningful statutory standards and (b) at the same time enforcement officers of many kinds at all levels freely exercise an ungranted discretionary power to move against those who are less deserving of prosecution and to do nothing about those who are more deserving of prosecution, even when the discretionary power is unguided by statutory or other standards and directly violates clearly expressed legislative intent. More sensible would be a system that in both respects would be exactly the opposite—allowing delegations without meaningful statutory standards, but disallowing the unguided and unchecked power of selective enforcement. Still more sensible would be a system designed for proper control of all discretionary power.

³³ Systematic discrimination, if it can be shown, may be a ground for review. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). But capricious action is not enough. Cf. *Edelman v. California*, 344 U.S. 357 (1953). See W. LAFAVE, *ARREST* 161-3 (1965); Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961) (containing a good collection of authorities and a skillful analysis).

Decisions to prosecute or not to prosecute are almost always unreviewable. See, e.g., *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967). Of course, a judicial trial is an acceptance of a prosecutor's decision to prosecute, not a review of it. A rare case of review of a decision to prosecute is *Universal-Rundle Corp. v. FTC*, 352 F.2d 831 (7th Cir. 1965), *rev'd on other grounds*, 387 U.S. 244 (1967); another such highly exceptional case, emphasizing the tradition, is *People v. Walker*, 14 N.Y.2d 901, 252 N.Y.S.2d 96, 200 N.E.2d 779 (1964), *conviction rev'd*, 50 Misc. 2d 751, 271 N.Y.S.2d 447 (Sup. Ct. 1966).

For an argument that prosecutors' decisions should be judicially reviewable, see K.C. DAVIS, *DISCRETIONARY JUSTICE* 207-14 (1969).

The foundations of the system into which we have drifted are much in need of reexamination.

V. HOW TO ALTER THE NON-DELEGATION DOCTRINE TO MAKE IT EFFECTIVE AND USEFUL

Five principal steps should be taken to alter the non-delegation doctrine and to move toward a system of judicial protection against unnecessary and uncontrolled discretionary power: (a) the purpose of the non-delegation doctrine should no longer be either to prevent delegation or to require meaningful statutory standards; the purpose should be the much deeper one of protecting against unnecessary and uncontrolled discretionary power; (b) the exclusive focus on standards should be shifted to an emphasis more on safeguards than on standards; (c) when legislative bodies have failed to provide standards, the courts should not hold the delegation unlawful but should require that the administrators must as rapidly as feasible supply the standards; (d) the non-delegation doctrine should gradually grow into a broad requirement extending beyond the subject of delegation—that officers with discretionary power must do about as much as feasible to structure their discretion through appropriate safeguards and to confine and guide their discretion through standards, principles, and rules; (e) the protection should reach not merely delegated power but also such un-delegated power as that of selective enforcement. Each of these five proposals will now be elaborated.

(a) The basic purpose of the traditional non-delegation doctrine is unsatisfactory and should be changed. It should no longer be either to prevent delegation of legislative power or to require meaningful statutory standards. The purpose should be to do what can be done through such a doctrine *to protect private parties against injustice on account of unnecessary and uncontrolled discretionary power.*

Looking backwards, one may appreciate an observation by the Supreme Court in 1825 in an opinion by Chief Justice Marshall:

Congress may certainly delegate . . . powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.³⁴

The most important questions are for the legislature, and its purpose

³⁴ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

must be discernible either through what it says or from the nature of the subject and circumstances, but when those requirements are satisfied, delegation is permissible, says the 1825 Court. That formulation may be sounder than what has come later—the overworked notion that in any and all delegations some "standards" must be stated.

The purpose spun in recent opinions is unfortunate both in what it attempts and in what it fails to attempt. The courts should assert that legislative bodies do and should delegate, not that they are forbidden to. They should assert that putting the content of the Code of Federal Regulations through the congressional enacting process would mean worse government, not better government, because Congress is and should be geared to major policies and main outlines, and administrators are better able to legislate the relative details, sometimes including even major policy determinations. The courts should recognize that administrative legislation through the superb rule-making procedure marked out by the Administrative Procedure Act often provides better protection to private interests than congressional enactment of detail.

Affirmatively, the courts need to do much more than they have been doing through the non-delegation doctrine to provide protection against arbitrariness. This observation will be fully implemented in the ensuing discussion.

(b) Safeguards are usually more important than standards, although both may be important. The criterion for determining the validity of a delegation should be the totality of the protection against arbitrariness, not just the one strand having to do with statutory standards.

For instance, a delegation *without standards* of power to make rules in accordance with proper rule-making procedure and a delegation *without standards* of power to work out policy through case-to-case adjudication based on trial-type hearings should normally be sustained, whenever the general legislative purpose is discernible. The risk of arbitrary or unjust action is much greater from informal discretionary action, but even there the protection from safeguards is likely to be more effective than protection from standards. For instance, if one administrator in exercising discretionary power without hearings uses a system of open findings, open reasons, and open precedents, but another who is also acting without hearings never states findings or reasons and never uses precedents as a guide, the delegation to the first administrator is much more deserving of judicial support than the delegation to the second.

During the past decade the courts have been moving toward the use of safeguards and away from the use of standards as the test for valid-

ity of delegations. This movement seems to stem from a 1958 analysis of the law of delegation, emphasizing procedural safeguards rather than standards.³⁵ One of the earliest cases to use the new approach was *Warren v. Marion County*,³⁶ asserting without qualification:

There is no constitutional requirement that all delegation of legislative power must be accompanied by a statement of standards circumscribing its exercise. It is true that a contrary view has frequently been expressed in the adjudicated cases, particularly the earlier ones, but the position taken in such cases is not defensible. It is now apparent that the requirement of expressed standards has, in most instances, been little more than a judicial fetish for legislative language, the recitation of which provides no additional safeguards to persons affected by the exercise of the delegated authority. . . . As pointed out in Davis on Administrative Law, the important consideration is not whether the statute delegating the power expresses *standards*, but whether the procedure established for the exercise of the power furnishes adequate *safeguards* to those who are affected by the administrative action.³⁷

A good many state courts have been following that lead in emphasizing safeguards instead of standards.³⁸ One basic need of the non-

³⁵ 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.08, 2.15 (1958).

³⁶ 222 Ore. 307, 353 P.2d 257 (1960).

³⁷ *Id.* at 313-4, 353 P.2d at 261.

³⁸ A few examples: The California Supreme Court has emphasized that the need is usually for safeguards rather than for standards, but the opinion also contains a good deal of unrealism, such as the statement that legislative power "is vested exclusively in the legislature, and cannot be delegated by it." *Kugler v. Yocom*, — Cal. 2d —, 445 P.2d 303, 306, 71 Cal. Rptr. 687, 690 (1968). Upholding a delegation, the Iowa court declared: "We have always held to the adequate standards or guidelines test . . . but we agree the presence or absence of procedural safeguards is important . . ." *Elk Run Tel. Co. v. Gen. Tel. Co.*, — Iowa —, 160 N.W.2d 311, 317 (1968). In *Butler v. United Cerebral Palsy, Inc.*, 352 S.W.2d 203 (Ky. 1961), a statute with no standards authorizing establishment and operation of schools for "exceptional children" was sustained, on the basis of what the court called an examination "in terms of safeguards against abuse and injustice." *Id.* at 208. The holding was relied upon in sustaining a statute without standards delegating authority to grant or refuse permission "to place or receive a child" for adoption. *Commonwealth v. Lorenz*, 407 S.W.2d 699 (Ky. 1966). A New Jersey court found standards adequate and then declared: "Additionally, a defendant has the benefit of adequate procedural safeguards. It has been said that standards are not as important as are procedural safeguards and outside checks upon discretionary power." The court went on to analyze the safeguards. *Dep't of Health v. Owens-Corning Fiberglas Corp.*, 100 N.J. Super. 366, 385, 242 A.2d 21, 31 (Super. Ct. 1968). The court emphasized "presence or absence of procedural safeguard" in upholding a delegation in *Schmidt v. Dep't of Resource Dev.*, 39 Wis. 2d 46, 58, 158 N.W.2d 306, 313 (1968).

Sustaining a standard as adequate, a federal court realistically said that "The Constitution does not prohibit delegation. . . . [I]t would be impossible for Congress to determine beforehand those drugs to which it wishes a particular policy to be applied

delegation doctrine is for further spread of this movement. What is needed is not simply a substitution of a requirement of safeguards for a requirement of standards but a consideration of both safeguards and standards in order to determine whether the total protection against arbitrary power is adequate.

(c) The crucial consideration is not what the statute says but what the administrators do. The safeguards that count are the ones the administrators use, not the ones mentioned in the statute. The standards that matter are the ones that guide the administrative determination, not merely the ones stated by the legislative body. The test should accordingly be *administrative* safeguards and standards, not *statutory* safeguards and standards.³⁹

Accordingly, the proposal has recently been advanced that "the courts should continue their requirement of meaningful standards, except that when the legislative body fails to prescribe the required standards the administrators should be allowed to satisfy the requirement by prescribing them within a reasonable time."⁴⁰

and to formulate specific rules for each situation," and that "Another suggested approach, perhaps a similar one, is that the validity of delegation be tested more on the basis of safeguards rather than standards." *Iske v. United States*, 396 F.2d 28, 31 (10th Cir. 1968).

³⁹ A recent Illinois decision, *Chicago v. Pennsylvania R.R.*, 41 Ill. 2d 245, 242 N.E.2d 152 (1968), is a good one for illustrative purposes. The statute prohibited signs or billboards on any state highway "other than as may be directed by the authority having jurisdiction over such highway." ILL. REV. STAT. ch. 121, § 9-112 (1965). The authority with such jurisdiction was the City of Chicago. Speaking of "a naked grant of discretionary power unaccompanied by any standards," 41 Ill. 2d at 254, 242 N.E.2d at 156, the court held the statute "an impermissible delegation of legislative authority." *Id.* at 256, 242 N.E.2d at 157. The result is that the legislative intent to prohibit signs on highways was thwarted until the legislature could act again. Should not the court have saved the statute and at the same time have protected against arbitrary exercise of the delegated power? The court might have held that power of city officers, unguided either by statutory standards or by their own announced standards or rules, is impermissible, but that if officers do about as much as they feasibly can do in adopting standards or rules to guide determinations in particular cases, that is all that is required. The subject matter the legislature has intended to regulate thus would not go unregulated, but at the same time affected parties would be protected against what the court called "arbitrary power to make exceptions." *Id.* at 252, 242 N.E.2d at 156.

Whatever awkwardness might be involved in disposing of the specific case along the line suggested would usually be avoided as soon as the law would become clear that the court would allow either the legislative body or the administrators to supply the required standards. Any administrator, threatened with a challenge on the ground of invalid delegation, would normally supply the required standards before the court so orders. As soon as the new system would become fully operative, all the significant interests would be amply protected: The legislative body would not be required to write standards it is ill-prepared and disinclined to write; the standards or rules would be formulated by the administrators, under threat of judicial compulsion; private parties would be protected from arbitrary action which can and should be guided by standards; and normally litigation to produce these desirable results would be unnecessary.

⁴⁰ K.C. DAVIS, *DISCRETIONARY JUSTICE* 58 (1969) (italics in original omitted).

When an administrator is making a discretionary determination affecting a private party, standards which have been adopted through administrative rule-making are just as effective in confining and guiding the discretionary determination as would be standards stated in the statute. They are not only as effective but in one important aspect they are better. The weakness of a judicial requirement of *statutory* standards is that legislators are often unable or unwilling to supply them. The strength of a judicial requirement of *administrative* standards is that, with the right kind of judicial prodding, the administrators can be expected to supply them. To the extent that the objective is to require standards to guide discretionary determinations in cases affecting particular parties, that objective can be better attained through judicial insistence that administrators create the standards through rule-making than by judicial insistence upon statutory standards. Legislative bodies should clarify their purposes to the extent that they are able and willing to do so, but when they choose to delegate without standards, the courts should uphold the delegation whenever the needed standards to guide particular determinations have been supplied through administrative rules or policy statements.⁴¹

(d) Another strength in the idea that the courts should require administrative standards whenever statutory standards are inadequate is that the idea opens the way for courts to give more attention to the manner in which administrators confine and structure their discretionary power. The requirement of administrative standards will and should naturally grow into a somewhat larger requirement—that administrators must do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through not only standards but also principles and rules. In other words, the non-delegation doctrine will evolve into a broad system of judicial protection against unnecessary and uncontrolled discretionary power. The judicial undertaking will be a large and difficult one, but the courts have often accepted other such self-assigned tasks and have seen them through.

(e) Shifting the non-delegation doctrine to a judicially-enforced requirement that administrators must do what they reasonably can do to develop and to make known the needed confinements of their discretionary power through standards, principles, and rules, as well as

⁴¹ A provocative idea is that a legislative body may properly choose to delegate discretionary power to one agency, to be exercised in conformity with standards and procedures to be prescribed by a second agency. Somewhat more complex is a federal statute along this line, providing that the Water Resources Council "shall establish . . . principles, standards and procedures for Federal participants in the preparation of comprehensive regional or river basin plans . . ." National Water Commission Act, 42 U.S.C. § 1962a-2 (Supp. IV, 1969).

to structure their power through procedural safeguards, will open the way for a judicial requirement that will reach not only delegations of power but also assumptions of undelegated power, including especially the enormous power of selective enforcement.

In broad perspective, the American legal system has become one in which courts usually strive to protect citizens against injustice at the hands of any public officers except enforcement officers. No one has planned the exception. No one would. It is the product of long-term drift. Injustice at the hands of *any* public officer should be subject to judicial correction, whenever the issues are appropriate for judicial determination. This means, more specifically, that injustice from police, prosecutors, regulatory agencies, licensing agencies, and any other administrators in the exercise of initiating and prosecuting powers should be subject to judicial correction.

The ideal of "equal justice under law" can and should be extended to the initiating and prosecuting functions, so as to correct an outstanding flaw in the basic system of American justice.

VI. THE FUTURE—NON-DELEGATION, DUE PROCESS, AND COMMON LAW

As the courts shift the non-delegation doctrine from a requirement of statutory standards to a requirement of administrative standards and safeguards, then shift further to a broad requirement that administrators do what they reasonably can do to structure and confine their discretionary powers through safeguards, standards, principles, and rules, and as that requirement in turn is extended to apply to the huge powers of initiating and prosecuting, including selective enforcement, what has started out as a non-delegation doctrine will grow into something that will reach well beyond delegation. The non-delegation doctrine will merge with the concept of due process and may perhaps move from a constitutional base to a common-law base.

Although what has just been suggested may seem to involve more imagination than facts, the basic movement has already begun. Some courts have already ignored the absence of statutory standards and have held that due process forbids the administrators to exercise their discretionary power in particular cases without first creating administrative standards or guides. The further development of this idea seems inevitable, because as soon as it is understood, it has strong appeal.

Let us examine three illustrative cases. The outstanding one is *Holmes v. New York City Housing Authority*.⁴² The Authority re-

⁴² 398 F.2d 262 (2d Cir. 1968).

ceived 90,000 applications annually but could admit only 10,000 families to public housing. Except for some preference candidates, "Applications . . . are not processed chronologically, or in accordance with ascertainable standards, or in any other reasonable and systematic manner."⁴³ Each application expired after two years, a renewed application stood no better than a first application of the same date, no open waiting list was used, determinations of ineligibility were not made known to applicants, and many applications were never considered by the Authority. The complaint charged that "these procedural defects increase the likelihood of favoritism, partiality, and arbitrariness."⁴⁴ The court held that "due process requires that selections among applicants be made in accordance with 'ascertainable standards,' . . . and, in cases where many candidates are equally qualified under these standards, that further selections be made in some reasonable manner such as 'by lot or on the basis of the chronological order of application.'"⁴⁵

Although the *Holmes* opinion was quite properly written in terms of due process, it could also have been properly written in terms of a non-delegation doctrine. Either way, the key factor is not the failure of the statute to control or guide the determination of which applications to grant or deny; the key factor is the *administrative* failure to control or guide that determination. The court's assumption was entirely sound that absence of either a substantive or a procedural system in the statutory framework would be permissible if the administrators provided such a system. So the court might properly have held that the delegation was unlawful unless or until the requisite procedural and substantive system was worked out through administrative action.

An earlier case—a rather important one—was *Hornsby v. Allen*.⁴⁶ The suit was for deprivation of civil rights under 28 U.S.C.A. § 2201, on the ground that the mayor and aldermen of Atlanta had denied an application for a liquor license on the basis of "a system of ward courtesy"⁴⁷ under which licenses were granted only upon approval of one or more aldermen of the ward. The court declared: "The public has the right to expect its officers to observe prescribed standards and to

⁴³ *Id.* at 264.

⁴⁴ *Id.*

⁴⁵ *Id.* at 265.

⁴⁶ 326 F.2d 605 (5th Cir. 1964). A still earlier case is *United States v. Atkins*, 323 F.2d 733, 742 (5th Cir. 1963): "The testimony of the Registrars reveals that they have no set standard for the 'grading' of questionnaires. . . . The Board [of Registrars] . . . must adopt uniform objective standards."

⁴⁷ 326 F.2d at 607.

make adjudications on the basis of merit. . . . [A]bsolute and uncontrolled discretion invites abuse."⁴⁸ The idea comes out quite clearly that the standards may come from the officers and need not come from the ordinance. The court repeated this important idea when it made the vital assertion that the guides may be in rules and regulations: "If there are too many qualified applicants, then the proper remedy is for the Board of Aldermen to adopt reasonable rules and regulations which will raise the standards of eligibility or fix limits on the number of licenses which may be issued in an area; the solution is not to make arbitrary selections among those qualified. . . . If it develops that no ascertainable standards have been established by the Board of Aldermen by which an applicant can intelligently seek to qualify for a license, then the court must enjoin the denial of licenses under the prevailing system and until a legal standard is established and procedural due process provided in the liquor store licensing field."⁴⁹

Again, although the court was thinking in terms of due process, it might properly have held the delegation unlawful unless rules and regulations supplied the standards of eligibility. Due process and non-delegation seem to merge.

Another such case—an especially good one—is *Smith v. Ladner*.⁵⁰ A statute conferred on the Governor absolute power, with no guides or standards, to grant or deny non-profit corporate charters. Instead of holding that the statutory delegation of what the court properly called "absolute and arbitrary discretion"⁵¹ was valid, and instead of holding that it was invalid for lack of either safeguards or standards, the court granted relief on the ground that "neither the statute nor any administrative regulation provides any constitutionally sufficient procedure for the denial of charters."⁵² The clear implication is that an administrative regulation establishing procedural safeguards and providing standards to guide discretion could correct the deficiencies. If so, *Smith v. Ladner* may be a harbinger of the future. It deserves to be.

The three cases—*Holmes*, *Hornsby*, and *Ladner*—all involve judicial creativeness of the kind that is both natural and timely. Perceptive judges have long realized the unreality of the requirement of meaning-

⁴⁸ *Id.* at 610.

⁴⁹ *Id.* at 610, 612.

⁵⁰ 288 F. Supp. 66 (S.D. Miss. 1968).

⁵¹ *Id.* at 68.

⁵² *Id.* at 70. The court departed from its theory—the theory here emphasized—when it remarked that "any denial of a charter, otherwise lawful, to the plaintiffs under the statute as presently written violates the Due Process Clause . . ." *Id.* Consistently with the rest of its opinion, it might well have said that any denial of a charter is a denial of due process unless the Governor provides adequate standards and safeguards.

ful statutory standards and at the same time have been uneasy about the extent of unnecessary discretionary power, whether delegated or undelegated. The judges in the three cases turned away from the unrealism of the non-delegation doctrine, but they felt that justice required judicial intervention to correct the unnecessary and uncontrolled discretionary power. The handiest tool was due process, and the easiest means of correction was a judicially-enforced requirement that the administrators create their own standards. The approach of the three cases will spread. It should.

Perhaps the non-delegation doctrine will gradually turn into a facet of due process, as in the three cases. But in the longer term, perhaps the constitutional base will give way to a common-law base. Either way, the reality will be that the law requiring administrative development of standards and safeguards to control discretionary power will be judge-made law. A good deal of our administrative law, much more than is usually realized, is common law. The uncodified law requiring administrative findings, for instance, is almost entirely common law, as is a good deal of the law of judicial review of administrative action. Probably the law the courts will fashion to require administrators to develop standards, principles, and rules to confine discretionary power should be subject to legislative change; if so, the courts might well regard it as common law rather than as constitutional law.

The ideal, which probably can never be fully achieved, was stated by the Supreme Court in 1886 in the great case of *Yick Wo v. Hopkins*:⁵³

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For, the very idea that one man may be compelled to hold his life, or the means of his living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails⁵⁴

⁵³ 118 U.S. 356.

⁵⁴ *Id.* at 369-70.

Mr. DINGELL. Our next witness is Mr. W. W. Marsh, executive vice president, National Tire Dealers and Retreaders Association, Inc.

Mr. Marsh, we are happy to welcome you to this committee for such statement as you choose to give. If you will give your full name and address, and identify your associate at the committee table for the purposes of the record, we will be most appreciative, and you will be recognized for such statement as you choose to give.

Mr. MARSH. May I represent Mr. Ashley Sellers, our counsel.

Mr. DINGELL. We are certainly happy to welcome you to the committee for such statement as you choose to give.

**TESTIMONY OF W. W. MARSH, EXECUTIVE VICE PRESIDENT,
NATIONAL TIRE DEALERS & RETREADERS ASSOCIATION, INC.;
ACCOMPANIED BY ASHLEY SELLERS, COUNSEL**

Mr. MARSH. I am the executive vice president of the National Tire Dealers & Retreaders Association, Inc. Our association represents approximately 4,000 independent tire dealers who sell, service, and retread automobile and truck tires. We do not represent tire manufacturers, company-owned stores, or service stations owned or controlled by oil companies. The independent tire dealers who belong to this association are located in every state of the Union, handle the tires of every manufacturer distributed through dealers, and include small and large dealers, both wholesalers and retailers.

Each of them is dependent upon his own capital, selects the merchandise in which he deals and builds his own business in his local community. Our members are small businessmen in the finest tradition of the American economy.

It is an honor and a pleasure to appear before this committee, to discuss the subject of these hearings, "Small Business and the Robinson-Patman Act." In view of the nature of our constituency, Mr. Chairman, I am sure you will understand that we as representatives of the association consider this a very important opportunity to present the views and represent the interest of the small businessmen for whom we speak. We intend to discuss fully the issues outlined in your opening statement, to state our views on the criticisms of the Robinson-Patman Act, to examine its application to independent tire dealers, and its effectiveness in protecting them from the dangers feared by Congress when it enacted the Robinson-Patman Act.

We fall in the category outlined by the chairman in his opening statement of those "who feel that more should be done to carry out the congressional intent which resulted in the enactment of the Robinson-Patman Act."

Let me begin first by dealing with the criticisms of the Robinson-Patman Act. It has been charged in these hearings and in the reports cited in these hearings that the Robinson-Patman Act "protects obsolete and inefficient types of business" (statement of Mr. Stigler, Tr. 243).

Based upon what we know about the small businesses this association represents, I would have to say that the statement is inaccurate and inappropriate. Despite the threats of increasing oligopoly in the tire industry and amidst great apprehension on the part of those of us

who represent independent tire dealers, the members of NTDRA have prospered greatly in the last decade.

By the introduction of efficiencies, by meeting consumer demand for services, through expertise in tire service, and through the close and trusted relationship with customers that characterizes community businesses, the independent tire dealers we represent have confirmed their rightful place in the tire distribution market. I attach to this statement a copy of our NTDRA tire dealers' survey for 1968 and 1969, prepared by Dr. Warren W. Leigh, NTDRA's marketing consultant, which document these statements. That is the redbook attached.

Mr. DINGELL. Without objection that will be inserted at the proper place in the record.

Mr. MARSH. Thank you.

(The booklet referred to follows:)

NTDRA TIRE DEALERS SURVEY 1969

BY DR. WARREN W. LEIGH
NTDRA MARKETING CONSULTANT

PROGRESS
MERCHANDISE MIX
SERVICE MIX
TIRE SALES
EMPLOYMENT
TIRE BRANDS
RETREADING OPERATIONS
VOLUME



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1969 NTDRA FIRE DEALERS SURVEY

INTRODUCTION

As planned for the past several years, the National Fire Protection Association has made another survey of fire dealers and distributors. Table I is a chart of the responses for 1969, compared to 1968 and prior to 1967. We believe that while we have done it a secondary trend chart which can be accepted and compared quite satisfactorily with large reports in 1968 in the secondary study made at that time.

Distribution of Responses



TABLE I
NTDRA DEALER RESPONSES BY GEOGRAPHICAL AREAS
1969, 1968 and 1967

Geographical Area	1969 Responses		1968 Responses		1967 Responses	
	No.	%	No.	%	No.	%
North East	63	19.3	67	19.7	61	18.7
Mid Atlantic	67	21.1	63	18.2	57	19.1
North Central	60	19.4	57	16.1	53	18.0
North West Central	11	3.4	13	12.1	43	12.4
South Central	44	13.5	38	11.0	43	12.4
Mountain	22	6.8	20	5.8	32	9.2
Pacific	40	12.3	58	16.7	50	14.4
Others	9	2.8				
TOTAL	326	100.0	346	100.0	348	100.0

Distribution by Sales Volume



TABLE II
DISTRIBUTION OF RESPONDENTS BY SALES VOLUME CATEGORIES
1969 and 1968

No.	No.	No.			
Year	Category	Dealers	Year	Category	Dealers
1969	\$2,000,000 and over	21	1968	\$1,000,000 and over	11
1969	1,000,000 to 1,500,000	22	1968	500,000 to 999,999	17
1969	500,000 - 999,999	8	1968	250,000 - 499,999	11
1969	250,000 - 499,999	6	1968	200,000-	1
1969	100,000 - 249,999	34	1968	Under 100,000	1
1969	Under 100,000	35	1968	Under 100,000	34
1969	Total	326	1968	Total	340

The general upward shift in dealer volume is obvious. At the time of the survey it seemed advisable to set limits of the next-to-smallest size group at \$100,000 to \$249,999 rather than at the previous top figure. The next group then was extended to \$499,000 instead of to \$399,000.

This year 26 dealers reported sales of two million dollars and over, and 33 between one and two millions! The other volume data was high also.

TABLE III
DISTRIBUTION OF RESPONDENTS TO 1969 SURVEY COMPARED
TO MEMBERSHIP BREAKDOWNS

Year	1969 Survey	Membership
Year	1968	Percent
\$2,000,000 and over	8.0%	3.5%
1,000,000 to 1,500,000	10.1	8.9
500,000 - 999,999	16.9	19.5
250,000 - 499,999	24.5	27.0
100,000 - 249,999	28.5	30.6
Under 100,000	12.0	10.5

While there are variations, with the exception of the largest group, the findings match up fairly well. However, due to the larger number of huge dealers the average respondent's sales this year equals \$621,000 as compared with \$513,626 in the broader-based 1968 Study.

Product and Service



CHART I
DEALERS' PRODUCT AND SERVICE PATTERN
1969 vs. 1968

Passenger and truck tirements have moved upward slightly. Retreading is almost the same. Other merchandise and service sales are off slightly.

TABLE IV
NUMBER AND PERCENTAGE OF RESPONDENTS OFFERING EACH
PRODUCT AND SERVICE - 1969

	Dealers	% of Dealers Offering
Passenger Tires	337	95.4%
Truck Tires	214	87.1
Retreads	114	89.0
Other Services	220	47.2
Other Merchandise	3	67.5
	326	23.9
		-
		8.0

* Over 100% Natural

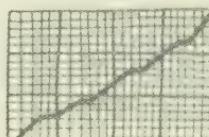
The percentages of sales do not differ so markedly from a year ago - they are slightly lower in the service areas and in the "Other Merchandise" category.

In furtherance of this sales analysis, dealers who were non-retreaders were separated from those who operated retread shops. The primary demarcation between them was, of course, the lower ratio of retreading sales for the non-retreaders.

Non-Retreaders	- 13.1% retread sales
Retreaders	- 31.2% retread sales.

The non-retreader sales ratio is 13.1 percent to 4.7 percent found in our earlier 1969 Study but the ratio for retreaders is quite close, being only one percentage point higher in 1969.

Dealer Sales Gain—1969



Wholesale shipments of tires according to RMA, registered an advance through June of 1969 over the corresponding six months of 1968 of 7.3 percent for both passenger and truck tires. The NTDRA dealers showed a rather startling 15.3 percent gain as shown in Table V.

TABLE V
DEALERS MAKING SALES GAINS OR LOSSES — SIX MONTHS — 1969
vs.
CORRESPONDING PERIOD 1968

Group	Number Lossing	Number Gaining	Net
0 Gain		5	5
1 - 4%	12	19	7
5 - 9%	6	54	48
10 - 14%	13	50	37
15 - 19%	2	17	15
20 - 24%	4	44	40
25 & Up		44	44
TOTALS	37	233	196
Net gain (median)	15.3%		

III. DEALER GROSS PROFITS

The gross profit percentages for the dealers which were reported in the 1969 survey are shown below. The distribution is skewed to the right.

TABLE VI

DISTRIBUTION OF NTDRA DEALERS CLASSIFIED BY GROSS PROFIT PERCENTAGES - SIX MONTHS (1969) vs. SIX MONTHS (1968) AS PORTRAYED IN THE 1969 QUESTIONNAIRE

	1969 Survey (114 Respondents)	1968 Survey (115 Respondents)
35 - 39.9	23.2	25.5
40 - 44.9	18.3	11.7
45 - 49.9	3.7	2.9
TOTALS	100.0	100.0

Median %

Average gross profit percentage for 1969

Two sets of quartiles (A and B) derived from the 1969 study are shown and compared to the quartiles published in the 1968 Study.

	1969 Survey (114 Respondents)	1968 Survey (115 Respondents)
Upper Quartile	42.2%	41.0%
Median	36.7	35.5
Lower Quartile	26.8	30.5

The upper quartile represents the gross profit of the middle-placed concern of the upper half of the group and the lower quartile represents the midpoint gross profit of the bottom forty percent. The measures for 1969 and 1968 are shown.

DEALER NET PROFITS BEFORE TAXES

In addition to the gross profit percentages, net profits were determined for net profits, as shown below.

Lower Quartile	5.5	3.6	9.6%
Median	7.6	5.3	7.6%
Upper Quartile	5.3	9.6	9.6%

Retail Tire and Retread Prices

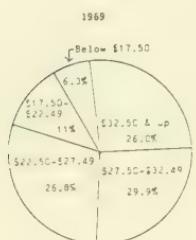


Retail passenger tire lists, on an index basis, were up 5.7 points in June, 1969 over the average for 1968.

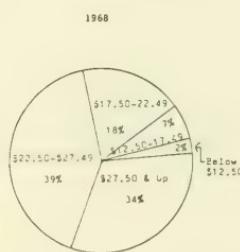
A comparison between the 1969 and 1968 retail prices is shown on Chart II.

CHART II

RETAIL PASSENGER TIRE PRICES RECEIVED BY NTDRA DEALERS 1969 vs. 1968



Median Price \$28.50

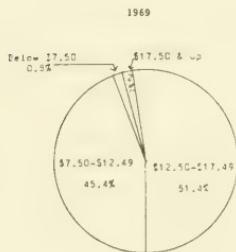


Median Price \$25.70

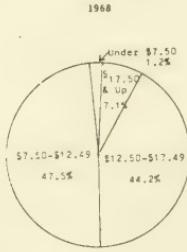
Retail prices received for passenger tire retreads are shown and compared with those of a year ago in Chart III.

CHART III

PRICES RECEIVED BY NTDRA DEALERS FOR PASSENGER TIRE RETREADS 1969 vs. 1968



Median Price \$12.87



Median Price \$12.70

Retread prices of passenger tires, as noted, have risen only 1.3 percent—from \$12.70 to \$12.87—over the year, yet the price spread seems to have narrowed. Only 2.4 percent of all retread sales are above \$17.50 and a mere bagatelle is below \$7.50 so the two price groups, \$7.50 - \$12.49 and \$12.50 - \$17.49 account for 97 percent of the sales.

Dealer Location



MAP III

DEALER LOCATION

BY STATE AND CITY

1960



In this section, the dealer location is shown by state and city. The size of the dot indicates the number of dealers.

While the 1960 census of 1960 indicated that approximately 14,100 auto dealerships were in operation, only 10,000 dealerships or about 71 percent of those in 1950 still exist in 1960. Thus, there has been considerable liquidation. This means that each remaining dealer now has to serve a larger area and mark-up prices will no longer be feasible. It is an uphill battle, and many dealers find it difficult.

We can say that NADA dealers are well dispersed throughout the country, and for the most part the city. While 62 percent of them are located "downtown" or within the city, there is also an equal distribution, especially between urban and non-urban. As a result of the fan-shaped out with the urban explosion, apparently no longer are dealers

Retreading By NTDRA Dealers



The 1968 annualized specialty questionnaire survey in order to secure information on the nature and general retreading operations among dealers. The annual survey covering all volume levels of operations, our first year, is shown in Table VIII.

TABLE VIII
NUMBER OF RETREADERS
BY SALES VOLUME CLASSIFICATIONS

1969

SALES VOLUME CLASSIFICATION	NUMBER OF RETREADERS	PERCENTAGE	NUMBER OF RETREADERS	PERCENTAGE
Total	159	100	108	57.4%
Under \$100,000	89	56	48	44.4%
\$100,000 - \$199,999	93	60	54	50.0%
\$200,000 - \$299,999	55	35	33	30.6%
\$300,000 - \$399,999	33	21	21	19.4%
\$400,000 and up	26	17	13	12.0%

In this sample 57.4 percent of the group operated retreading shops. This is below the findings in the Spring Study which showed 64.9 percent as retread operators. Retreading appears to be most common among the \$250,000 volume-and-up dealers. Table IX shows the percentage of retreads to total sales by volume groups.

TABLE II
ESTIMATED NUMBER OF FAMILIES IN NEW ZEALAND
DIVIDED BY GEOGRAPHICAL REGION
1967

Region	Number of families	
	Estimated number	Percentage of total
North Island	187	50.1
South Island	180	49.9
Total	367	100.0

DISTRIBUTION: MIGRATIONS BY REGION

The following table shows the estimated number of families in each region in 1967. The figures are based on the 1967 Census of Population and Dwellings.

TABLE II

CONCENTRATION OF FAMILY POPULATIONS BY GEOGRAPHICAL AREA
1967

Area	Number of families	
	Estimated number	Percentage of total
North Island	187	50.1
South Island	180	49.9
Total	367	100.0

The migration operation ratio is low in the North East, North East Central and North West Central sections. But throughout the Southland, the Mountain and Otago sections the ratio is high.

DEALER'S ORDERING CAPACITY AND PRODUCTION

The following table shows the monthly production of each dealer and their monthly ordering capacity.

TABLE XI
MEDIUM DEALER PASSENGER TIRE RETREADING CAPACITY
AND PRODUCTION BY MONTHLY UNIT OUTPUT
1969

Monthly Unit Output	Number of Dealers	Total Monthly Production	Total Ordering Capacity
1	1	1	1
2	1	2	2
3	1	3	3
4	1	4	4
5	1	5	5
6	1	6	6
7	1	7	7
8	1	8	8
9	1	9	9
10	1	10	10
11	1	11	11
12	1	12	12
13	1	13	13
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38	1	38	38
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358	1	358	358
359	1	359	359
360	1	360	3

TABLE XII

NUMBER OF TIRES CARRIED BY DEALER RESPONDENTS
1969

Number of tires carried	Percentage of dealers
Under 100	10.0
101-200	10.0
201-299	39.8
300-499	30.0
500 or more	20.2

The distribution of tire capacity is similar to that of the number of tires carried. The number of dealers carrying 100 or less tires monthly is 10 percent. The number carrying 299 or less tires monthly is 50 percent. The number carrying 500 or more tires monthly is 20 percent.

The capacity per unit is shown in Table XIII. The average capacity per unit is 10.1.

TABLE XIII

AVERAGE RETREADING CAPACITY OF RETREAD DEALER RESPONDENTS
1969

Capacity per unit	Percentage of dealers
Under 100	10.0
101-200	10.0
201-299	39.8
300-499	30.0
500 or more	20.2

In the case of tires over 100 capacity is approximately 100 per month and per unit. 293 dealers or 30 percent of operation have the capacity rate of 100 or less (less than average) in their per unit rates in the passenger tire area.

In total, the total rate is approximately 30 percent of the shops have retread capacities of under 100 units monthly and these account for under two percent of total capacity. These shops—under 100 units per month, however—turn out about 3.7 percent of the output. Here again almost 50 percent of the dealer shops (68) are in the 299 unit class or below and account for only 12.3 percent of the capacity and 24 percent of the output. Again, per unit rate is measured in the larger size.

DEALER POSITION IN THE RETREADING INDUSTRY

From these data, it is possible to make some rough guesses as to the NTDRA Dealers' position in the passenger and truck tire retreading industry. This will take some juggling since our sample is not typical of the entire NTDRA dealer membership. We have to make an adjustment for this factor first.

Our sample showed average sales per dealer of \$621,000 vs. the NTDRA dealer average of \$514,000. The 1969 sample then is some 20 percent above average. Since retreading activity concentrates relatively heavier than sales in the hands of the larger dealers, this distortion is even greater for retreading. Let us assume, therefore, a double or 40 percent distortion factor in this case.

Adjusting average dealer (as per the Survey) capacity and production to 60 per cent, we get the following:

$$\text{Adjusted Passenger Retread Monthly Capacity} = 1834.4 \times .60 = \\ 1101 \text{ units.}$$

$$\text{Adjusted Passenger Retread Monthly Production} = 1272.7 \times .60 = \\ 764 \text{ units.}$$

$$\text{Annual Adjusted Capacity} = 1101 \times 12 = 13,212 \text{ units.}$$

$$\text{Annual Adjusted Production} = 764 \times 12 = 9,168 \text{ units.}$$

According to Additional Road Signs, NTDRA, 2443 NTDRA dealers retread passenger tires. Hence, multiplying the above data by this figure, we get the following passenger tire retread total:

$$\text{NTDRA Dealers Annual Passenger Retread Capacity} = 32,276,916 \\ \text{units.}$$

$$\text{NTDRA Dealers Annual Passenger Retread Production} = 22,297,424 \\ \text{units.}$$

Our estimate of passenger retreads for 1969 is 41,000,000. On this basis, NTDRA dealers will do 54.4 per cent (22,297,424) of the passenger (41,000,000)

tire unit retread output in 1969. This ratio seems a little high for 50-52 percent is believed to be a more realistic figure.

We proceed in the same manner to determine total NTDRA Dealers' position in the truck tire retread field, except that here we use a 65 percent adjustment factor instead of the 60 percent used for passenger retreads. The justification for this alteration was the fact that the truck retreading distribution was less orderly and less asymmetrical than was the passenger tire retreading profile.

Using this 65 percent adjustment factor, we derive annual per-dealer capacity and production truck retread figures of 3,896 and 2,371 respectively. Raising these figures to the NTDRA membership basis by multiplying by 2108 (the number of truck retreaders), we get annual totals of 8,212,768 and 4,998,068 respectively. Dividing the latter figure by the anticipated 1969 truck tire retread production (4,998,068) an NTDRA dealer output ratio of (9,400,000)

53.2 percent is derived. This appears to be reasonable and realistic.

RETRREADING BUSINESS IN 1969

The final inquiry in retreading asked the status of the business in 1969 vs. 1968. The responses are summarized in Table XIV.

TABLE XIV
STATE OF THE RETREADING BUSINESS IN 1969 vs. 1968

Business Status	1968	1969	1968	1969
Flourishing	\$100	\$100	37%	25%
Same	\$100	\$100	40%	29%
Contracting	\$100	\$100	42%	41%

Percent of tire retreading in 1969 appears to be running somewhat better than a year ago, although sales figures apparently do not indicate. The same situation holds for truck tire retreading. Off-the-road activity is just holding its own for these field readings.

Stores Operated By Dealers



This year again we ask of the dealers about the number of stores operated and their store plans. The returns are given below.

TABLE XV
NUMBER OF STORES OPERATED BY NTDRA DEALERS

Number Stores	1968	1969
One	...	71.1%
Two	...	15.9
Three	...	3.8
Four	...	1.1
Five - Six	...	1.2
Seven - Nine	...	1.0
Ten or more	3	1.0
TOTAL	315	100.0

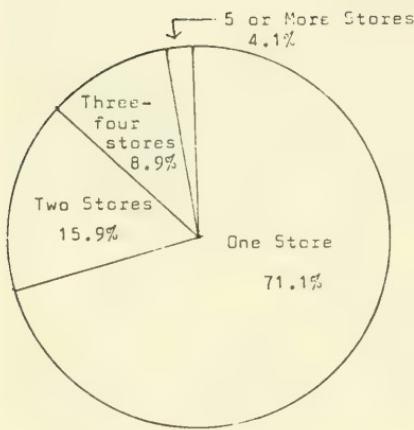
The total number of stores operated by our dealer sample (statistically) amounted to 606. This number divided by the 315 respondents gives a store operation ratio of 1.92. The comparison with a year ago is shown in Chart IV.

CHART IV

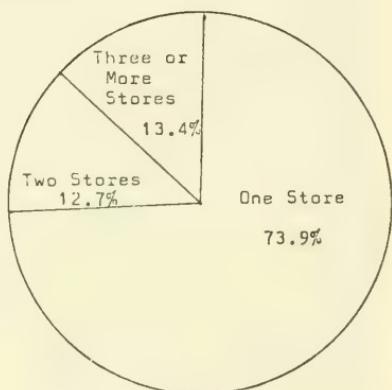
NUMBER OF STORES

OPERATED BY NTDRA DEALERS

1969



1968



Average 1.9 Stores

Average 1.5 Stores

From the increased store operation ratio, Dealers' store plans for 1968 seemed to have been carried out. This year's plans are very similar to those presented a year ago so if high interest and shortage of capital do not prevent their fruition, 1970 will see further dealer store developments.

The projection for 1969 was 30 to 31%. Apparently, it fell 1 to 2% below average and yet the trend here is significantly strong and indicative of the far sighted planning of the Independent Tire Dealer in his forecast for the future.

CHART V

DEALER'S NEW STORE PLANS



Before turning to a closer examination of dealer's operating plans and investment commitments, let's see how labor costs and interest rates affect labor costs. In reply to the inquiry, "To what extent will your labor costs and interest rates affect your planning?" dealers responded as follows:

TABLE XVI

TO WHAT EXTENT HIGH LABOR COSTS AND INTEREST

RATES WILL AFFECT DEALER PLANNING?

High labor costs and interest rates will:	Not affect planning	Affect planning
Not affect planning	11	88.9
Affect planning	88.9	11.1
Total	100	100

Dealer Improvement and Investment Plans



Beyond all doubt both soaring labor costs and interest rates are having some depressive effect on dealers' building expansion and modernization programs. Yet when dealers' expansion and investment plans are examined, they are progressively bold and venturesome, indeed. See Table XVII.

TABLE XVII
NTDRA DEALERS IMPROVEMENTS AND INVESTMENT PLANS

Area	Type Investment	Number Dealers	Aggregate Investment (Total 222 Dealers Answering)
Store Facilities:	New Buildings	9	\$ 725,500
	Expansion	30	886,250
	Modernization	70	706,400
	Total	109	\$ 2,318,150
Retreading Facilities:	New Buildings	11	\$ 488,750
	Expansion	23	694,500
	Equipment	71	1,002,500
	Extruder Equipment	5	128,000
	Total	110	\$ 2,313,750
Equipment:	Trucks	9	\$ 113,500
	Equipment (Matrices, Molds, Lifts, Tools)	81	438,500
	Brake and Wheel	10	56,000
	Total	100	\$ 608,000
Branches - Sub Stores:	Branches	51	\$ 2,325,250
	Service Center	1	87,500
	Total	52	\$ 2,412,750
Warehouses:	Warehouses or Enlargement	15	\$ 1,121,250
TOTAL INVESTMENT			\$ 8,773,900
Average Per Dealer			\$ 39,522

Watchword— “Expansion”



When dealers were asked which departments were to be expanded and which cut-back, the vote was loud and clear for expansion. The 1969 picture is recorded in Table XVIII.

TABLE XVIII
DEPARTMENTS TIRE DEALERS PLAN TO EXPAND OR CUT-BACK
DURING THE NEXT TWELVE MONTHS

	EXPAND	CUT-BACK
Passenger Tires	40.0	8.4
Passenger Retreading	36	19.5
Truck Tires	36	2.1
Wheels	36	2.1
Other Tire Sales	36	4.9
Used Tires	36	10.3
Wiper and Brake Supplies	36	8.1
Other Services	36	11.3
Other Merchandise Sales	36	1.1

All dealers get an approval vote of 80 percent or better. If there are weak areas, they are Passenger and Truck Retreading and Other Merchandise Sales.

Product Prospects



To keep check on NTDRA Dealers, tire programs and merchandise attitudes, dealers were asked whether they now handle or plan to handle certain types of tires. Also, they were asked to indicate the sales prospects for each type in 1970 vs. present sales. The types of tires now handled or plan will be in their sales programs soon, are depicted in Table XIX.

TABLE XIX

PASSENGER TYPE TIRES HANDLED PRESENTLY OR
PIANNED TO BE HANDLED SOON

Presently Handled	Planned to be Handled Soon	Present %	Planned %
Conventional			
Conventional		7	3.5%
Conventional	13	4.7	
Radial		9	3.3
Radial - Wide	233	7	2.6
Conventional - Wide	1	0.4	
Total	17	6.2	

With the exception of conventionals all of the tire types mentioned seem to have generally declined within the last three 80 percent brackets.

Comparatively speaking it is interesting to note that:

1. Radial tires are up slightly 7.8 percent.
2. Super and standard tires are down 10.8 percentage points.
3. Conventional/extra load tires and radials seem to have fallen off lightly.

Looking ahead to 1970 dealers generally are optimistic as to the sales prospects for most of these type products. For the score see Chart VI.

CHART VI

NTDRA DEALER SALES EXPECTATIONS FOR VARIOUS TYPES OF TIRES
1970 vs. 1969

Business Outlook— 1970



In the final question pertaining to plans and business outlook, we asked the dealers to voice their opinions regarding the outlook for five key items in 1970 vs. 1969. Their crystal ball findings are summarized in Table XX.

TABLE XX
DEALS, OPINIONS ON OUTLOOK FOR FIVE KEY ITEMS
IN 1970 VS. 1969

Items	Number of Answers	Percentage Expressions		
		1970 1969	1970 1969	1970 1969
Total Sales	293	1.7	1.7	1.7%
Net Profits	290	1.7	1.7	1.7%
New Equipment	228	15.7	15.7	15.7%
Retread Casing Supply	238	23.9	23.9	23.9%
Competitive Situation	273	60.1	60.1	60.1%

The total sales and net profit picture is almost the duplicate of what was reported a year ago. The manpower and new equipment situations appear to have improved slightly. The competitive situation has suffered much, at least not sufficiently to be statistically significant.

IS AIR POLLUTION BECOMING A PROBLEM?

Finally dealers were asked if air pollution control regulations were becoming a problem in their areas. Apparently it is not as the responses show.

TABLE XXI
ARE AIR POLLUTION CONTROL REGULATIONS
A PROBLEM TO YOUR SHOP?

Answers	Number of Answers	Percent Total
Total	305	
Yes	27	8.9%
No	224	73.4%
May not apply	54	17.7%

SUMMARY AND CONCLUSIONS

There is every evidence that NTDRA dealers have not only moved forward in 1969, but that they are alert and pushing toward more goals to conquer. This statement is supported by the findings of the 1969 NTDRA Dealer Survey. The following statements point up some of the more important findings of this survey.

1. NTDRA Dealers appear to be continuously growing in size and scale of operations—56 respondents exceeded \$1,000,-000 in annual sales volume.
2. The typical tire dealers' sale and service pattern is quite constant, but 1969 shows more emphasis on tire and retread sales and less on service and other merchandise activities. This statement is further proved, by an analysis of sales concentration reported in Table IV.
3. While our sample showed an overall retread sales ratio of 13.1 percent, dealers with retread shops had a retread sales ratio of 31.2 percent.
4. In the first six months of 1969, NTDRA Dealers (per sample) reflected a sales gain of 15.3 percent or over double that of the industry's unit tire sales gain.
5. For the six month's period, 1969, versus the corresponding period in 1968, Dealer gross profits advanced about .4 percentage points, and net profits gained .1 percent or more. It will be recalled that manufacturers' profits in most fields have been depressed in this recent period.
6. Retail tire prices, at the NTDRA Dealer level, have registered a phenomenal gain. They have advanced \$2.80 per tire from \$25.70 to \$28.50. This has been caused primarily, by the sales of higher priced tires, although tire prices have advanced somewhat.
7. Retread tire sales prices have remained relatively constant—they have moved upward only some 2.4 percent.
8. Tire dealers, as other types of retail sellers, appear to have followed retail trade which has concentrated in the urban areas and diffused into the neighborhoods and suburbs.
9. Of the 1969 dealer sample, 57.4 percent operated retread shops. This, we believe, is some seven percent below the general dealer average. Shop incidence is higher, of course, among the middle size dealers and above.
10. Retreading shop incidence varies from 33.3 percent in the North Central States to a high of 73.1 in the South Atlantic area. This is a variation of over 100 percent. The Mountain States recorded an even higher ratio.
11. Dealer retreading, more and more, seems to be concentrating in the larger shops. In the case of both passenger and truck tire retreading, 50 percent of the smaller shops accounted for only some 12 percent of the output, while the top 25 percent of the shops turned out some 70 percent of

- the units.
12. Capacity in both the passenger and truck tire retread sectors is well in excess of operating rates, which approximate 69.4 percent in the former and 60.8 percent in the latter area. In total, shops are working on approximately a 9.6 hour basis.
 13. From the data presented, we estimated that NTDRA retreaders produce some 50 percent of passenger tire retreads and somewhere between 53-54 percent of the retread truck tires.
 14. Dealers report, by a slight majority, that the 1969 passenger tire retread business is running the "Same" or "Better" than a year ago. The outlook for truck tires is even somewhat stronger. Off-the-road tires seem to be about holding their own.
 15. The data indicate that dealers have been more active in branch store operations during the past year. Dealers show 1.9 stores per dealer in 1969 vs. 1.5 stores previously. The outlook for further expansion in this area is good, if high labor costs and astronomical interest rates do not block development.
 16. Dealers indicate bold and strong expansion and capital investment plans for the year ahead. It was revealed by 222 dealers that they plan to spend a total of \$8,773,900 for new stores, retread plants, warehouses, modernization and equipment in the forthcoming twelve months. This amounts to an average of \$39,522 per dealer.
 17. Relative to departmental de-
 - velopments, dealers voted for expansion in most areas. Passenger and truck tire sales showed up strong as did sales of winter and studded tires. Retreading was somewhat less optimistically indicated although it ran about four for expansion vs. one vote against.
 18. The new belted tires—in both standard and wide treads—show a higher dealer acceptance. Their exposure has increased over the year. Snow and studded tires, also, appear strong. Regular tires—even with wide treads—and radials seem to have lost a few points in position.
 19. Dealer sales expectations, in 1970, support the above findings. Over 59 percent of the dealers expect materially better sales for belted tires with standard treads next year and 49 percent see the same condition for belted tires with wide treads.
 20. Looking ahead, dealers foresee in the next twelve months:
 - a. Better total sales.
 - b. Better net profits.
 - c. The manpower situation about as it is presently.
 - d. About a static casing supply.
 - e. A competitive situation approximately as it is presently or slightly worse.
 21. Air pollution does not pose a problem to the great majority of the dealers presently.
 22. Finally, NTDRA dealers have been pushing ahead in 1969 and from their product, facility, and investment plans they expect to continue, if not to accelerate, their gains in 1970.

ADDENDA

Reference taken from 1968 NTDRA Tire Dealers Survey

- Photo of Table XVI — "Road Signs," p. 15
 Photo of Table VIII — "Road Signs," p. 9
 Photo of Table VI — "Road Signs," p. 8
 Photo of Table VII — "Road Signs," p. 8
 Photo of Chart III — "Road Signs," p. 13
 Photo of Table XIV — "Road Signs," p. 14
 Photo of Table XV — "Road Signs," p. 14

TABLE XVI
PERCENTAGES OF NTDRA DEALERS SELLING VARIOUS TYPES
OF TIRE BRANDS - 1968
(1104 Dealers the Base)

Brand Groups	Percent of Dealers Selling		Percent Mentions Selling as			3rd Line
	Answers	100% Base	Total	First or Only Line	2nd Line	
Big 5						
Major	74.4	38.5	100	73.0	16.8	10.2
Assoc.	32.7	16.9	100	41.3	37.1	21.6
Smaller Mfr.						
Major	33.9	17.5	100	49.9	33.1	17.0
Assoc.	9.2	4.8	100	34.3	31.4	34.3
Wholesale Distr.	24.8	12.8	100	35.9	37.6	26.5
Foreign	17.0	8.8	100	16.5	54.8	28.7
Own Brand	1.2	0.7	100	38.5	23.1	38.4
Total	193.2	100.0				

TABLE VIII
NUMBER AND PERCENTAGE OF SURVEYED DEALERS AND NTDRA
MEMBERS NOT-OPERATING AND OPERATING RETREAD SHOPS

Shop-Operation	Survey Sample		NTDRA Membership
	Number	%	
Total	1104	100.0	4000
No Shop	387	35.1	1404
Operate Shop	717	64.9	2596

TABLE VI

AVERAGE NUMBER OF EMPLOYEES BY NTDRA SALES VOLUME

CLASSIFICATIONS - 1968

Sales Volume Groups (000)	Number of NTDRA Members	Average Number of Employees
1 - 99	416	3.8
100 - 249	1,228	5.6
250 - 499	1,080	9.9
500 - 999	780	17.5
1,000 - 1,999	356	28.6
2,000 and Over	140	51.7
Total	4,000	12.9

TABLE VII

SALES PRODUCTIVITY PER EMPLOYEE BY NTDRA DEALER VOLUME

CATEGORIES

Sales Mid-values	Average Number Employees	Average Sales per Employee
\$ 50,000	3.8	\$13,158
175,000	5.6	31,250
375,000	9.9	37,878
750,000	17.5	42,857
1,500,000	28.6	52,447
2,500,000	51.7	48,356

CHART III

SALES OF THE AVERAGE RETREADING DEALER VS. THE NON-RETREADING DEALER
1968

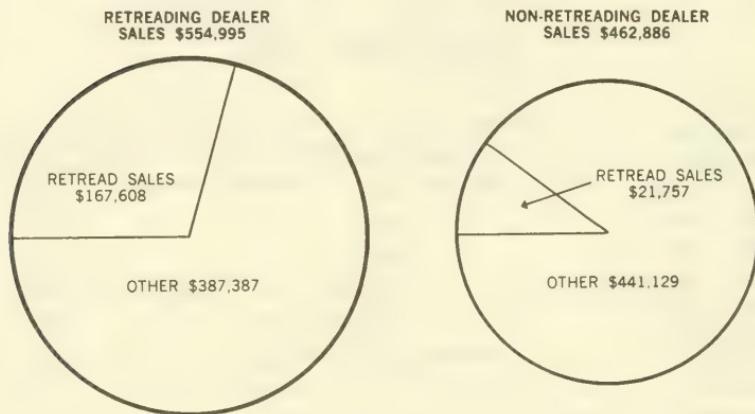


TABLE XV
THE RETREADING MARKET BY UNITS AND VALUE - 1968

Type of Retread Market	Units (000)	Tires	Total Value (000)
Pass. Tires	40,500	\$ 11.50	\$465,750
T & B Tires	9,300	27.50	255,750
Off-Road Tires	180	450.00	81,000
Airplane Tires	900	60.00	54,000
Total	50,880		\$856,500

TABLE XIV
ESTIMATES OF NTDRA DEALER SALES RELATIVE TO TOTAL INDUSTRY SALES - 1968
(000)

Products Service	NTDRA Dealer Sales	Industry Volume	Percent Dealers to Industry
Pass. Tires	\$889,888	\$3,145,000	28.3
Truck Tires	\$346,924	\$1,100,000	31.5
Retreading	\$439,660	\$ 856,500	51.8
Batteries	\$ 34,928	\$1,000,000	3.5
Tires & Other Serv.	\$ 92,452		
Brake & Wheels	\$ 65,744	\$ 850,000	
Other Mdse. etc.	\$180,796		7.7

Mr. MARSH. It has also been charged that the Robinson-Patman Act is anticompetitive. This is an illusory proposition at best. The Robinson-Patman Act was designed to and properly serves the purpose of preserving the competitiveness of our economy. The Robinson-Patman Act, as we view it, is designed to preserve competitors, without which there could be no competition.

The critics of the Robinson-Patman Act should recognize that it would be just as logical to say that the civilized and legal requirement that disputes among citizens be resolved in court is a restraint on freedom and liberty. If I might draw a more popular analogy, this criticism of the Robinson-Patman Act is no more logical than to say that the rules of football prohibiting clipping, tripping, and personal fouls deprive that sport of its status as a game of physical contact. The rules are designed to avoid needless injury to the players, without whom there would be no sport at all.

It has been charged that the Robinson-Patman Act has "harmed small business more than it has helped it" (statement of Mr. Posner, Tr. 246). Speaking for small business in the tire distribution industry, we challenge this statement. We have no evidence of any harm inflicted upon our members by the Robinson-Patman Act. On the other hand, we are confident that our current prosperity is in some measure attributable to the restraints imposed upon manufacturers by the act.

It has been charged as well that the Robinson-Patman Act is the product of the depression and was designed to cure the economic ills of the depression. Frankly the logic of this charge escapes us. What were ills for small businessmen in the 1930's would immediately become dangers to small businessmen in the 1970's were Robinson-Patman repealed or seriously modified.

I submit that underlying the criticism of Robinson-Patman is an attitude and mood most unsympathetic to small business. The critics of Robinson-Patman seem to be imbued with the premise that small business is somehow inefficient.

As one who has represented small business for two decades, I can conceive of no statement with which I more profoundly disagree. In evaluating small business one must carefully distinguish between efficiency and power in the marketplace. Robinson-Patman, in my view, deals with power; it properly protects small businessmen by restraining the misuse of power. In protecting small businessmen, it serves not only those immediate beneficiaries, but the society as a whole.

I am comforted in my beliefs by an extemporaneous remark by then Senator Humphrey during hearings of the Senate Small Business Committee in 1959. Senator Humphrey stated:

There is a philosophical argument here which is quite basic. If the whole scheme of the American system is to see how you can get some goods from the manufacturer to the consumer at the cheapest price, then you are going to eliminate practically all the main streets and all the business outlets of this country. . . . they have got a good system in Russia like that. I mean they manufacture stuff and they have one big department store in Moscow, Gum's; and you like it or not, that is the big deal, and, that is where you go. Now, I am against that, unqualifiedly.

When you are talking about the consumer, you are not talking about a special breed. Everybody is a consumer. So is the manufacturer. So is the intermediary. So is the wholesaler. Our family are consumers, and we are not manufacturers or wholesalers.

I think there is a tendency in American economic law—it is maybe not your fault, but I want to get it off my chest—there is a present tendency, which is aided and abetted by some powerful influences in this country, all you have to do is get a big processor and get the stuff out to the consumer as cheaply as you can.

The trouble is, it is never cheap. What happens, somewhere along the line all the savings are gobbled up, and they are generally gobbled back up at the starting point...

Of course, I do not know what will happen to the country, but it will get the price down.

The problem we get into here is, if a tire company can sell directly on the alleged claim that this is the way you reduce the price to the consumer, pretty soon you are going to have everybody working for the tire company, because what are the other people going to do if every big company does this?

I think you can get Heinz ketchup cheaper if you can deliver it right from the Heinz Manufacturing Co., out to the hamburger stand or out to the barbecue pit. It would maybe save some money. But what about the grocers? What happens to them? What happens to them after a while?

You cannot put everybody in the Army.

(Hearings before Subcommittee of the Select Committee on Small Business, U.S. Senate, 86th Cong., first sess., June 17, 18, and 19, 1959, Tr. 143-144)

Fundamentally it is because of this philosophy that we oppose those critics of the Robinson-Patman Act who seek to reduce its effect on the American economy.

There is one criticism of the act which we endorse. It has been said that "vertically integrated firms are often able to arrange their affairs so as to avoid being subject to the Act" (statement of Mr. Posner, Tr. 246). It appears to be the law that the Robinson-Patman Act does not deal with that situation in which the manufacturer distributes directly through a company owned store at a price which is the same as or less than that charged to the independent distributor.

Even though there is a price discrimination between the distribution outlets, it is held that there is no violation of Robinson-Patman because the manufacturer has legally made no sale and is technically dealing with itself.

This loophole is suggested in the statement of Vice President Humphrey which I quoted. This loophole poses the most dangerous threat of dual distribution on the tire industry—the abuse of the power of giant manufacturing concerns.

These inherent objections to practices of dual distribution led the Senate Small Business Committee to issue a report on January 15, 1964, recommending legislation "to prevent a dual distributor from using his size and entry into many markets to weaken competition in any one of these markets."

The proposed legislation was designed to require the disclosure of information to determine whether the manufacturer's power was being utilized to discriminate between markets. The Senate Small Business Committee described this proposed legislation as "a logical extension of the Robinson-Patman Act's proscription by such use of power by a seller" (report of the Subcommittee on Retailing, Distribution, and Marketing Practices to the Select Committee on Small Business, U.S. Senate "Studies of Dual Distribution: 'The Automotive Tire Industry,'" Jan. 15, 1964, 21-22).

These recommendations followed extensive hearings participated in by representatives of the National Tire Dealers and Retreaders Association, including many of its members, who presented specific

instances of discriminatory practices by manufacturers. These conditions, apparently considered legal despite the Robinson-Patman Act, has continued unabated.

We note as well that the report of the House Select Committee on Small Business, dated December 30, 1964, reached similar conclusions as to the dangers of dual distribution.

2. While dual distribution, when practiced by a firm with substantial market power, can be harmful to small business, there should be no general or per se rule against dual distribution. Its misuse, however, creates many of the harmful effects found to exist.

The misuse of dual distribution can amount to a perversion or distortion of our competitive free enterprise system, which is traditionally based on the assumption that the individual firm will seek to maximize its position, within the rules of the game....

If, however, a retail, wholesale, or processing establishment engaged in dual distribution makes market decisions not on the basis of its own situation—the competition which it faces, and similar factors—but instead follows a market strategy based solely on what is best for its parent manufacturing plant, this is a basic change in the normal competitive relationship at that level of the market.

Legislation to cure these evils was also introduced in the House.

Mr. Chairman, the National Tire Dealers and Retreaders Association supports such legislation, as it did in the early 1960's. Resolutions of our membership meeting in annual convention have continually supported legislation to curb abusers of dual distribution and to require financial disclosure relating to dual distribution practices. We recommend such legislation to you again at this time.

We do so in the context of these hearings because we consider the present dual distribution loophole to be an anomaly in the Robinson-Patman Act—one that has a direct effect on our membership.

Beyond that, we fully support the purposes and provision of the Robinson-Patman Act and would oppose vigorously any attempt to repeal or water it down.

Mr. DINGELL. Mr. Marsh, you have given the committee a very helpful statement, for which we thank you very much.

Mr. Conte?

Mr. CONTE. I have no questions. I would like to compliment the witness for his excellent statement.

Mr. DINGELL. Mr. Potvin?

Mr. POTVIN. Mr. Marsh, I know that you were here while I asked a similar question of other witnesses. We would like a direct statement from you, however, if we may, on this question of whether the Robinson-Patman Act in one way or another affects the price which consumers pay.

Mr. MARSH. The tire business is today, as it has always been, a very highly competitive business. But I think the consumer today is enjoying a great many benefits from these forces of free competition.

We think that this is a pretty good testimony to a reasonable degree of the effectiveness of the text of the Robinson-Patman Act, because the last figures I saw from the Department of Labor on the indexes for tires compared to the prices of goods and commodities for sale in the United States still places it way below the average, and in fact relates tire prices back some 7 or 8 years, for a comparative statement.

So the consumer is benefiting today not only from a favorable price, but is also benefiting from the research, development, and ex-

tension of quality in new tires, despite some of the things that appear in the paper.

Mr. POTVIN. In the last few years we have seen a considerable number of innovations, such as a proliferation of the radial tire, the Poly-glass thing, the wider tread, and so forth.

Mr. MARSH. New types of construction, and all kinds of new cord fabrics.

Mr. POTVIN. So you are saying, first of all, that tires are a better buy today than they were 5 or 10 years ago.

Mr. MARSH. I will say two things, sir. They are a better buy, and they are better quality. One relates to quality and one to price. And I use the Labor Department index for my source of that figure.

Mr. POTVIN. Now, absent the Robinson-Patman Act or something very similar to it, you have testified implicitly that there would be far fewer tire dealers in the country.

Mr. MARSH. I am positive of that.

Mr. POTVIN. Would you feel, if that were so, there would have been less competition?

Mr. MARSH. Well, we already are suffering a great deal from the forces of competition. The Federal Trade Commission had a survey back in, oh, I guess it started in 1947. And this resulted in the quantity distribution hearings about 1951.

At that time there were 21 major manufacturers in the United States. Today there are 14. One of those does not even build passenger tires any more. So really there are only 13 manufacturers. There are about five or six companies held by the majors who make tires who distribute through their dictates. And we are also getting the advantage, such as it is, of certain foreign manufacturers bringing tires into this country, which gives at least some freedom of choice in the marketplace, which is one of the things that is worrisome to a distributor.

When he finds himself locked out by the forces of big business, and denied the freedom of choice of changing brands of tires, he is in a very bad bargaining position. And this is still one of our advantages to this day, despite the fact that we have lost 33 $\frac{1}{3}$ percent of our tire manufacturers in a short period of less than 20 years.

We are finding that there is another change taking place, that there is a great growth in the private label type of business. The mass chain stores, the mass manufacturers, the discount houses, all have their own lines of tires. But by the same token, because it did not take any great stretch of the imagination to see how this might work in the course of a free enterprise system of economy, there are a great number of varying groups of independent tire dealers today who have continued to take advantage of this free force of competition, the lack of control, so that there is the opportunity to bargain, and they are thus able to even further protect the consumer by delivering tires at a lower commodity unit price.

Mr. POTVIN. Do you feel that if there had not been a Robinson-Patman Act, the number of manufacturers would have been reduced either more quickly or to an even lower level?

Mr. MARSH. I am just absolutely positive of that.

Mr. POTVIN. And if that had happened, there would unquestionably be a decrease in the ranks of the dealers as well, and, thus, at both the primary and secondary level there would have been less

competition. Would this in your opinion have resulted in higher prices?

Mr. MARSH. Of course, when you take away the protections afforded by this act, we have also opened the door to price fixing.

Mr. POTVIN. Thank you, Mr. Marsh.

Mr. DINGELL. Mr. Marsh, we are grateful for your presence and for your very helpful statement. Thank you very much.

Mr. MARSH. Thank you, Mr. Chairman.

Mr. DINGELL. Our next witness is Mr. Robert L. Wald, chairman of the Trade Regulation Committee, administrative law section, American Bar Association.

Mr. Wald, we certainly thank you for your presence today. If you will give your full name and address to our reporter for the purposes of the record, we will be happy to recognize you for such statement you choose to give.

Pleased proceed, sir.

TESTIMONY OF ROBERT L. WALD, WASHINGTON, D.C.

Mr. WALD. Robert L. Wald, a member of the law firm of Wald, Harkrader, Nicholson & Ross, 1320 19th Street N.W., Washington, D.C.

Mr. DINGELL. Mr. Wald, I should note, and counsel has reminded me, that while you are chairman of the Trade Regulation Committee of the administrative law section of the American Bar Association, you do not appear in that capacity. You appear as an independent, individual practitioner, in which capacity we are also happy to welcome you.

Mr. WALD. I certainly do, Mr. Chairman.

Mr. Chairman and members of the committee, I appreciate your invitation to testify today.

I am Robert Wald, a member of the Washington, D.C. law firm of Wald, Harkrader, Nicholson & Ross.

Prior to entering private law practice, I was a staff attorney with the Federal Trade Commission for several years, concluding my service as assistant to the General Counsel of the Commission. In my Government service and private practice I have been witness to, and sometime participant in, many of the developments in Robinson-Patman over the past 15 years.

I am presently chairman of the Trade Regulation Committee of the administrative law section of the American Bar Association and I believe that it is in that position I have been invited here today. I hasten, therefore, to say that the views I express are entirely my own. I do not speak for the Trade Regulation Committee, for the administrative law section, or for the American Bar Association, nor do I have any idea as to what the position of any of those groups would be with respect to those matters were it conceivably possible to develop a consensus.

I have been asked to direct my remarks to the administration of the law rather than to its philosophy. Unfortunately, it is difficult to maintain strict neutrality in the turbulent struggle over Robinson-Patman, and hearings such as these tend to bring out the combatant in all of us.

I am struck by the irony of much of the present debate. Historically, the opponents of Robinson-Patman have called it an anachronism, obsolete, archiac, at odds with the major thrust of our antitrust laws, a response to ancient business conditions which no longer exist. Somehow, in 1970, these criticisms seem to me, almost in the same degree, tired and unoriginal.

How little the assault on Robinson-Patman really has changed in 15 years. It spins like a very old record. I wonder if it is not possible that a law drawn to combat particular economic conditions rampant at the time of its enactment may yet have utility in other times; because those conditions which gave rise to Robinson-Patman 35 years ago may no longer exist does not mean that the statute is without purpose in 1970.

The preoccupation of the act's critics with the impact which this law could have on the classic, theoretical model of a competitive economy seems too simplistic in 1970. Despite the alarms regularly sounded as to the act's baleful impact upon competition, there is as yet no probative body of evidence that Robinson-Patman through its history has produced a measurable increase in the cost of living or price levels, that it has rigidified price structures, that it has deprived consumers of the benefits of efficient distribution and vigorous competition, or that it has perpetuated inefficiency, or unduly high profits—all of which charges were made in the October hearings of this committee. I would suggest that a purely economic approach to the law may be outmoded and one dimensional. Beyond the economic, are there not social values in this law which should be considered?

The latest attack on Robinson-Patman is harsh and unsentimental. "Competition assumes victims," one of the witnesses at this committee's October hearings said; and he added that an ethical standard which declares that the small businessman is entitled to equal treatment from his suppliers is "simply untenable."

"The ethics or morality of price discrimination be damned," say the new critics. "Even less do we concern ourselves with the goodness or badness of the businessmen who engage in price discrimination. Our interest is solely in the structural effects of discrimination."

This approach in 1970 seems depressing and curiously reactionary. You cannot read the transcript of this committee's proceedings in October without sensing in this most recent attack a kind of bloodless, clinical quality which is unresponsive to the troubled concerns which now increasingly are voiced about American business.

Perhaps the essence of the current debate over Robinson-Patman was summed up by Chairman Dingell in October:

Wouldn't I be fair in saying that we have an economy that is shot full of preferences and unfair advantages that flow here and there without often-times any rational basis . . . Aid when it gets to . . . Robinson-Patman, isn't that an attempt to lay out rules of fair conduct and shouldn't it be viewed from that standpoint rather than from the standpoint of raw theory.

I offer for the committee's consideration whether this is not the fundamental question on which the existence of Robinson-Patman today must turn.

However complex, convoluted, arcane and frustrating the language of Robinson-Patman, isn't it, at the least, a kind of morality play in the marketplace, an admonition that equality of opportunity, decency,

fairness, rough justice, are values which should not be ignored in business' headlong pursuit of profit.

Commissioner Elman—hardly an apologist for the statute—has written that—

The policy of the Robinson-Patman Act is rooted in the justifiable ethic that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller, weaker rivals.

We exist at a point in history when not only young people but thoughtful citizens of every age are raising the most searching questions about our venerated institutions. Is there any reason why anti-trust should be exempt? Is it sufficient in this troubled time to say that Robinson-Patman, with its admonition to business fairness and decency, should be demolished because it may run counter to a theoretical and perhaps wholly illusory economic model?

I will not persist further. I suggest only that the debate over Robinson-Patman be conducted on contemporary terms and not solely on arguments of an earlier time. But if it is concluded that Robinson-Patman represents a social and public policy which overrides any anti-trust concern, does this end it? Quite surely not. We must then ask whether this legislative mandate is being effectively applied. The answer plainly is "No."

In recent years, the Federal Trade Commission's Robinson-Patman administration has too often been an antic affair, only fitfully focusing on the basic purposes of the law, penalizing small business more than it has rewarded it, enhancing concentrations of power in our economy to a greater degree than it has restricted them. An analysis of Commission activities under the various subsections of the act leaves the dominant impression that the Commission, with its mandate to inhibit the power tactics of great business, has preoccupied itself with small fry—what Fred Rowe has called "puny respondents from the backwaters of business."

The Commission's discretionary authority to proceed against violations of the act too often has been applied to the very classes of business which the act presumably was designed to protect.

This misdirection of Commission enforcement energies over the years has been documented by many commentators and I need not belabor it here. But if FTC sights are out of focus, they can be adjusted.

A more disturbing aspect is the mounting evidence that the act today is largely unenforced by the Commission. This is sharply reflected in the actual statistics of FTC performance: the dramatic reduction in numbers of complaints issued in recent years, the failure to enforce compliance with outstanding orders, the slowdown in investigations.

Unless Robinson-Patman is given new vigor and new direction, it may shortly become a meaningless injunction. The act can only work through voluntary compliance—induced by the discipline of meaningful public enforcement as reinforced by private remedies. That deterrent does not presently exist.

It may be that in today's stirring clash of human events, Robinson-Patman, whatever its utility, should be given a low order of priority, and that in the allocation of the Federal Trade Commission's limited resources, it should be given no priority at all. But if it is the renewed

determination of the Congress that Robinson-Patman is viable public policy in 1970, then the Federal Trade Commission must allocate its energies in ways which will product the most effective and widespread compliance.

There are a variety of approaches and techniques which could be utilized. Let me suggest a few.

In Robinson-Patman enforcement, the Federal Trade Commission's objectives are threefold: to achieve voluntary compliance with the law wherever possible; to compel compliance, through formal process, where voluntary techniques fail; to assure continuing compliance once formal sanctions have been applied.

I think it fair to say—resoundingly—that these objectives are not being achieved. I do not believe this failure is a consequence either of incompetence or lack of dedication on the part of the Commission's staff. Yet the Commission plainly is at a crisis point and if the increasing paralysis of Robinson-Patman enforcement is not reversed, the statute may become, in fact, unenforceable.

In any realistic sense, Robinson-Patman compliance can only be accomplished by providing incentives to industry voluntarily to comply. The Commission can never have the resources formally to compel plenary obedience from industry.

It was reported earlier this week that the Commission's 1970 budget for Robinson-Patman is \$800,000. This figure, less than 5 percent of the Commission's total budget, seems absolutely minimal. Yet with the Commission's increasing and proper emphasis on consumer protection, there is no practical likelihood of any substantial increase in present Robinson-Patman funding levels. Thus, within its present resources, the Commission can achieve widespread compliance only through adroit, wise, imaginative, strategic use of selective formal enforcement procedures to give credibility to its informal, persuasive techniques and by that I mean both ad hoc case-by-case enforcement, and also formal rulemaking procedures.

And may I say for myself that I do not see any panacea in rule-making alone, Mr. Chairman, although that possibility has been suggested. I think the FTC's problems with rulemaking are quite different from those of some of the other administrative agencies dealing with a single industry. The Commission's jurisdiction, of course, covers the whole range of American industry. Unfortunately the price discrimination problems of one industry may not be applicable to others. And so it is very difficult to get an across-the-board rule which applies to all industries and all situations.

I think compliance can only be achieved through the use of selective formal enforcement procedures to give credibility to the Commission's informal persuasive techniques and to create a climate in which business will conclude that it is in its best interest not to risk Commission attack.

Mr. DINGELL. You brought up a point, I think, that is very good. FTC still has the opportunity to promulgate trade regulation rules on an industry-by-industry basis.

Mr. WALD. That is right.

Mr. DINGELL. To lay out guidelines for compliance with Robinson-Patman.

Mr. WALD. Right. And I might say that the Commission has never so far as I know instituted a rulemaking procedure in Robinson-Patman. And I certainly think it should where it can. I am simply saying that this isn't the answer alone to effective enforcement.

Mr. DINGELL. I agree. I have the distinct impression that \$800,000 is far too low for adequate enforcement of Robinson-Patman. Do you have a comment that you would like to make at this time?

Mr. WALD. \$800,000 as an abstract figure seems pretty high to me, Mr. Chairman, until I relate it to the rest of the Commission's budget, and then it turns out to be only 5 percent. And I always thought that Robinson-Patman was a very basic and fundamental portion of the Commission's jurisdiction. Yes, I would agree.

Mr. DINGELL. When you relate this figure to the budget, used in contesting the Robinson-Patman Act before the Commission on the part of some industry that might be afflicted with Robinson-Patman action by the Commission, it becomes very clear that this is a hopelessly low figure, does it not?

Mr. WALD. I think you might find, incidentally, Mr. Chairman, that some large respondents before the Federal Trade Commission probably spend \$800,000 in the defense of a single case lasting a number of years.

Mr. DINGELL. I wouldn't be at all surprised. It is my experience that a company that finances about half of its litigation costs out of its tax-payment can oftentimes better afford to do that than it can to fall into quick and easy compliance with the law. I have observed in antitrust cases big antitrust violators among the major members of our corporate industry will hire a couple or three floors of a hotel, fill it with lawyers, and proceed to try and motion the Government to death. And they will prolong the case for years, and regard themselves as engaged in a highly profitable activity while so doing.

Mr. WALD. That is one of the reasons there is such a high attrition among young lawyers in large law firms these days, they just don't take that any more.

The consequences of the breakdown in Federal Trade Commission enforcement in recent years has been a diminished interest on the part of business with the Robinson-Patman compliancy and a kind of covert disregard of the Commission by business. Today wide sectors of business fell little motivation to show more and appearance of compliance and may well develop an increasing appetite for conduct openly in violation of the law.

This condition will not be reversed without a shift in the Federal Trade Commission's procedures and priorities. I might say that with the advent of a distinguished new Chairman, with a Commission sensitive to the heavy barrage of criticism which it has suffered in recent months, and with a staff far more imaginative and dynamic than has publicly been suggested, the prognosis is not entirely hopeless.

A first order of priority would seem to be sharply stepped-up formal enforcement. Quite plainly, the Commission has engaged in much wasted Robinson-Patman effort. In recent years it has allocated a major part of its Robinson-Patman funds to dead-end investigations which ultimately were closed out. The antidote to this situation is almost trite: more effective policy planning on the part of the Commission, more careful definition of the types of cases to be investigated, more

sophisticated screening of cases, more careful management control of investigations, including greater use of investigational hearings and a better definition of the techniques by which relief is to be achieved, on a case-by-case litigation or industrywide.

Mr. DINGELL. May I interrupt you, Mr. Wald?

This problem of basic research or antitrust inquiry is something that troubles me. When you start on basic research on health or an antitrust inquiry, how do you know whether you are blundering down a blind alley, or whether the investigation might have a purpose or a use that is all totally different from what you anticipated? I don't want you to comment on it particularly at this time, but I do hope you will later address yourself to it. This question of allocation of resources, knowing whether something is a piece of litigation or an investigation which should be commenced or sidetracked is, I think, very fundamental to our examination here. I would like to know how the Commission is going to sort the sheep from the goats in this area.

Mr. WALD. If I can comment on it now. I think it is very difficult to sort them out at the beginning of an investigation, although I suppose perhaps some tighter screening could be done at that point. I think the record of the Commission's performance over the last few years shows that there have been an inordinate number of investigations which were ultimately concluded by recommendations of no complaint, investigations which extended for many months, even years. And it seems to me that we are so cost conscious these days, perhaps by just more efficient control over investigations at every stage—

Mr. DINGELL. Are you suggesting a reduced number of investigations in this area? Are you suggesting that the total volume of investigations be reduced?

Mr. WALD. No; I am not. In fact, I think that there is no reason why the numbers should not be increased. I would hope that they would be more productive numbers, in the sense that they would produce more meaningful cases.

Mr. ODEN. Mr. Wald, this morning Mr. Van Cise spoke on this same point. And he suggested that the Federal Trade Commission use their power under section 6 of the Federal Trade Commission Act to issue 6(b) investigational subpoenas, and to proceed under the Robinson-Patman Act rather than going on an ad hoc, case-by-case approach, and when they would get a complaint under the Robinson-Patman Act, rather than going ahead and launching an investigation on that one complaint, that they look at the industry and send out investigational subpoenas to discover whether this is a widespread practice.

Mr. WALD. You mean when a complaint is received that you immediately expand it into an industrywide investigation?

Mr. ODEN. I don't think he was alluding to just one complaint, but he was saying that probably the allocation that the FTC has for Robinson-Patman enforcement would be better spent—if you find yourself opening up several investigations within a certain industry, that rather than continue that line, you go ahead and issue section 6 investigational subpoenas as to find out whether this is an industry-wide problem.

Mr. POTVIN. To me the central point, Mr. Wald, is this: Mr. Van Cise used the example of the guideline resulting from the Meyer case; he said they are fine, but there are no teeth. He also suggested that if

they are coupled with the 6(b) it would be even better, because it would then have, so to speak, teeth.

Mr. WALD. That is right. I think there is a whole array of tools that the Commission can use, and certainly the 6(b) powers, are very valuable. I would use them much more in compliance matters, as a matter of fact. Once an order to cease and desist is issued, it generally falls into limbo at the Commission. Why shouldn't the Commission require from every respondent to an outstanding order a periodic report of compliance under its formal reporting powers.

Mr. ODEN. This is what Mr. Van Cise was speaking of, that in the past in some instances under Robinson-Patman violations they have gone in slowly but surely, sticking one toe in first and then more and more, and suddenly they found themselves engulfed in this industry, and that when you find yourself in that industry just on an ad hoc basis you should use other machinery like trade regulation rules, investigational subpoenas, and so forth.

Mr. WALD. I am suggesting that there is no exclusive power or particular power of the Commission that should be used to the exclusion of other powers, you have to adapt the Commission's broad range powers to the particular situation. There are obviously industries in which there are particular practices which are susceptible to an industrywide approach, using compulsory practices.

Mr. POTVIN. Orchestration is somehow the word that popped to mind.

Mr. WALD. Orchestration. That is a very good word.

In the middle area between voluntary law compliance and formal complaint, the Commission may be able to find more effective and efficient uses of its formal industrywide techniques. The great reach of the Commission's trade regulation rule authority has not been seriously tested in Robinson-Patman. It should be, backed up by aggressive formal complaint proceedings based on the rules. And I think rules only different from guides insofar as you do use formal sanctions to back up the rule. And that is the great merit or theoretical advantage of a rule, the rule is in effect a little law, and you could just allege a violation of that rule once you have a valid rule.

Mr. DINGELL. It is only useful while it has teeth and while the teeth are used.

Mr. WALD. Yes.

Mr. POTVIN. For the record, Mr. Wald, the trade regulation rule that you refer to as the device was first, I believe, publicly proposed in the inaugural address of Commissioner Everett MacIntyre. That would be sometime in 1961.

Mr. WALD. Right.

Mr. POTVIN. And it has been used in a deceptive practices context but not in a Robinson-Patman context, is that correct?

Mr. WALD. Yes.

Mr. POTVIN. And what such a rule does, it is usually referred to as a substantive rule. If you can show that you have broken the rule, then the person, the defendant cannot argue whether that is a violation, but simply whether he performed the act alleged, that is correct?

Mr. WALD. Yes.

Mr. POTVIN. So that it is substantive in that limited sense.

Mr. WALD. Yes.

Mr. POTVIN. Thank you, sir.

Mr. WALD. I might add a point which Rand Dixon has pointed out to me very convincingly, that rulemaking is legislating. And Congress has always been very jealous of its prerogatives in legislating. And so I am saying that that is another reason why rulemaking may not necessarily be a panacea here.

Creative innovations in informal procedures should be tried. If the Commission, like a stern schoolmaster, is determined to administer Robinson-Patman discipline without favor to small and great alike, would it not be appropriate for the Commission to temper with compassion its treatment of the little fellow who may be in technical violation of the law? New procedures might be devised to permit smaller companies to confess liability informally. Some years ago Commissioner MacIntyre urged the Commission to adopt what he called a "preinvestigative conference procedure" in which businessmen would be put on notice that the Commission intended to investigate a questioned practice and would be given an opportunity voluntarily to comply with the law and thus to avoid investigation and litigation. Would not some variation on this procedure now be useful in Robinson-Patman matters—perhaps even the establishment of a formal Conciliation Service within the Bureau of Discriminatory Practices? And in the area of small business indulgences, would some form of Robinson-Patman ombudsman be useful in channeling the grievances of small, disadvantaged businessmen through to effective relief?

I think the idea of having a representative—an officer of the Commission who would be a kind of small business ombudsman, who is there to receive the grievances or complaints of small business, and then help them take them through the Commission, where they may not have proper representation or proper advice—I think the idea is a good one.

Mr. ODEN. Mr. Wald, are you referring to the Commission's procedure for voluntary compliance?

Mr. WALD. No. I am distinguishing it from the AVC, assurance of voluntary compliance procedure, because that occurs after an investigation, which may be an extensive investigation, and a burden to someone. I am talking about a situation where the Commission says to a guy, "Here is what we have got on you," and he says, "You have got me." And the Commission then says, "Here is what we suggest you might do to correct it," and he says, "I am willing to do it." He doesn't have to undergo expense of an investigation, and he doesn't have to undergo the expenses of any formal procedure.

Mr. ODEN. I should say for the record, from personal experience I know that the Commission uses assurances of voluntary compliance without the necessity of a full scale investigation. At one time I worked for the FTC, and I sure had assurance without a full-scale investigation.

Mr. WALD. But you had some kind of investigation.

Mr. ODEN. So minimum that you can hardly refer to it as a full day's work. It might not be as formalized as what you are requesting, but they do have a similar procedure.

Mr. WALD. It shades into that procedure. I think all I am talking about is a more institutionalized procedure for what you apparently did.

In the Commission's formal compliance activities—policing existing Robinson-Patman orders to cease and desist—there is a wide opportunity for improved performance. Over its history, the Commission has entered more than 1,000 outstanding Robinson-Patman orders to cease and desist, yet it has brought only a handful of enforcement or penalty proceedings. Plainly, at this stage, a Robinson-Patman order to cease and desist is a tentative restraint at most, a nuisance of no consequence at the least. I would suggest that consideration might now be given to clearing the decks of many ancient Robinson-Patman orders so as to permit the Commission compliance staff to focus on its responsibility to police current or recent orders. The Commission might, for example, undertake, as it has often promised to do in the past, a genuine compliance sweep designed to let old respondents prove their rehabilitation. This could be done by inviting respondents, say to orders entered more than 10 years ago, to show cause through submission of a current report of compliance, why their orders should now be vacated.

The discretion, of course, would always remain with the Commission to maintain bellwether older orders on the books.

Having reduced the number of outstanding Robinson-Patman orders to more manageable numbers, the Commission thereafter might consider regularizing compliance activities of respondents by requiring routine periodic reports. That is the point I made before.

Paralleling any strengthening of the FTC's procedures for public enforcement of the statute should be a strengthening of private remedies. This committee may wish to undertake a study of possible new and creative approaches to this essential adjunct to public enforcement. While traditional treble damage remedies have been available to parties injured by Robinson-Patman violations, there has been limited use of private remedies by small business victims of the type of second-line discriminations which have constituted the bulk of commission activity. The reasons are self-evident: the amount of monetary damage suffered by the victim is usually small and thus the potential recovery insufficient to support difficult, prolonged private litigation. This pragmatic limitation now becomes more significant in the light of expansion of Robinson-Patman 2(d) and 2(e) coverage under the Fred Meyer doctrine to indirect customers, and the possible analogous expansion of 2(a) at some future date. It might be fruitful to inquire whether new forms of class actions could be devised, similar perhaps to stockholder derivative suits under the securities laws; whether perhaps some new form of summary relief could be granted; whether new rights of intervention at the Federal Trade Commission would be useful.

These are only superficial suggestions. The staff of the committee and the FTC's own staff I am sure will be more fruitful sources of imaginative and practical new techniques for reinforcing administration of the act. I would think that this committee and the Congress would be sympathetic to the efforts of the new Commission to improve its own performance and would accord to the new Chairman a period of grace in which to review the problems of Commission administration and to revamp Commission procedures. Any such program, however, presupposes acceptance of Robinson-Patman as valid public policy in 1970. This, I suppose, is the threshold determination before the committee.

Thank you.

Mr. DINGELL. Mr. Wald, you have given the committee a very helpful and thoughtful statement. We are grateful to you.

Mr. Conte.

Mr. CONTE. No questions.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Wald, first of all, let me say that, in the opinion of at least the staff of the subcommittee, you and Mr. Kennedy have cumulatively performed a signal service to these hearings. The ABA group, which studied the FTC under the leadership of Mr. Kirkpatrick, simply did not have as part of its mandate, the assignment of looking at the procedures, nor the rather stringent time circumstances under which they operated did not really allow sufficient time to do it. So that you and Mr. Kennedy have cumulatively, of course, added additional dimension to the former ABA study, for which we are very much in your debt.

One of the procedural questions that has been debated, some would say to death by this point, I suppose, is the question of delegation, Mr. Wald. Could you give us your views on whether there has been adequate or sufficient use of delegation by the Commission.

Mr. WALD. I think that there probably has been adequate delegation. The problem, it seems to me, is whether the delegation is sufficiently defined, whether—

Mr. POTVIN. You would revert, then, to Mr. Kennedy's point, that unless there is an overriding guideline of some sort under which the delegation is made, it is not a particularly meaningful delegation.

Mr. WALD. Yes, and I think the staff of the Commission itself is concerned about this. Any attorney likes to operate as independently as possible, or an economist. But I think you will find concern expressed within the staff of the Commission that they have insufficient guidance as to what they can do and how independently they can act.

Mr. POTVIN. One final procedure question, sir. On the question of issuance of complaints, it has, one notes, in recent years at least commenced to become the practice of the Commission to have public statements, dissents, if you will, in the issuance of the complaint. Now, as a practitioner, what inferences if any would you draw from, say, a five-man panel, if two publicly dissented from the issuance of a complaint?

Mr. WALD. I would tend to be entirely nervous, because I am sure that my client would expect me at the end of that case to have the votes of at least those two Commissioners. I believe however, that these are entirely independent gentlemen, and I have an absolute certainty that they are men of integrity and probity, and with no preconceptions as to the issues involved, and will exercise a completely fresh judgment at the end of the case based upon the evidence.

Mr. POTVIN. I trust there is no inference to the contrary.

Mr. WALD. I have no reason to think that even though a Commissioner has dissented to the issuance of a complaint, he would not decide the matter solely on the evidence.

Mr. POTVIN. Confining it to the public dissent of the issuance of a complaint, would you be willing to comment on whether you feel this is a useful procedure, or whether the dissent should be confined, perhaps, to the internal proceedings of the Commission?

Mr. WALD. I have no reason to think it isn't useful. In other words, an airing of these issues it seems to me is sometimes good.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Wald, you discussed, during your statement, the question of priorities at the Commission. And much has been said about the recording of the Commission's priorities and the reallocation of their resources. In this regard it has been suggested that the Commission concentrate in deceptive practices on the hundred largest advertisers in the United States, and in restraint of trade to the 100 largest manufacturing firms in the United States, allocating a certain percentage of their manpower to that area. Would you agree that some type of recording like that would be beneficial to the public and to the Commission's work itself?

Mr. WALD. I would prefer not to define it by a specific number of companies. I think, as I pointed out in my statement, that FTC—the focus of FTC Robinson-Patman enforcement has too often been on small companies, to the exclusion of larger companies. And so I think that disparities in economic size in this country carry with them different levels of responsibilities, and carry with them different problems which I think the Commission should focus on. In the advertising field I have no reason to think that a hundred large advertisers have engaged in any practices that the next 5,000 advertisers don't also engage in.

Mr. ODEN. This was the recommendation, I believe, from the Commission's Office of Screening and Planning to the Commission. The Commission for several years has been considering ways to reorder their priorities and get the most for their money, so to speak. And they say as to deceptive practices that the American consumer would be much more apt to receive advertising from the top 100 advertisers. And as far as carrying out their mandate of protecting the public interest, I think this is the reason why these recommendations were made.

Mr. WALD. I have no doubt that that is true. And I certainly think that it would be useful to put large advertisers under some kind of a spotlight. I am saying that in the advertising field I don't think you can cut it off so easily at 100. It doesn't go from a \$180 million advertiser to a \$10,000 advertiser.

Mr. ODEN. They were using that figure as far as a percentage of the allocation of resources was concerned.

Thank you, I have no further questions.

Mr. DINGELL. Mr. Wald, I am concerned about the matter that you discuss. Congress finds itself never able to really understand what the budgetary needs are, what the policy needs are of the regulatory agencies, because there are all filtered through the Bureau of the Budget. I wonder if you have some comments on that fact.

Mr. WALD. I do. I think that the Bureau of the Budget obviously can render valuable technical assistance to any agency. But the agency appropriations are determined by the Congress. They are men of judgment and intelligence themselves. The agency understands, I think, or should understand its own legislative mandate better than anyone else. And so I would think the agency should be permitted to present to the Congress what it believes its needs are. I see no reason

why the Bureau of the Budget should not be able to submit comments on those, and its own views as well.

Mr. DINGELL. This is my precise viewpoint, and the Bureau of the Budget should certainly be allowed to comment, that the agencies should be allowed to submit their budgets directly to the Congress. I think we have another situation where the only thing the Congress ever gets is what the Bureau of the Budget says the agency can submit to the Congress. And this is absolutely to deny the very intimate and close relationship of practically master and servant of the Congress to the agencies themselves. This is something that has greatly troubled me for many years.

Mr. WALD. I don't know what kind of technical assistance the Congress itself has. Maybe the Congress should have its own Bureau of the Budget.

Mr. DINGELL. I have come to the conclusion that we probably need another Bureau of the Budget. But the on reflection it occurs to me that one Bureau of the Budget is more than this country can stand, and to create another one might cause the ship to founder.

Mr. WALD. It might be a congressional bureau of the budget.

Mr. DINGELL. I am not sure just which would be worse, the congressional bureau of the budget or the other, if we were to have two. I know that one is very bad.

We thank you. You have given a great deal of thought to your statement, and your statement has been of help to the committee. We are grateful to you for your appearance.

Our next meeting will be on February 5, 1970, at 10 o'clock in the morning, at which time we will hear Mr. Frederick M. Rowe and Mr. Ira Millstein. Then we will meet at 2 o'clock and we will hear from Mr. Harold Halfpenny.

And on February 6 we will meet at 10, when we will hear Erma Angevine, executive director of the Consumer Federation of America, and at 2 o'clock on the same day, when we will hear from Stewart W. Pierce and Mr. Robert Brooks, professor, Department of Economics, Vanderbilt University.

If there is no further business to come before the committee at this time, the committee stands adjourned until 10 o'clock tomorrow morning.

(Whereupon, at 4:15 p.m., February 4, 1970, the subcommittee recessed, to reconvene at 10 a.m., Thursday, February 5.)

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

THURSDAY, FEBRUARY 5, 1970

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359, Rayburn House Office Building, Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representatives Dingell, and Horton.

Also present: Representative Hungate of the full committee; Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

This is a continuation of the special subcommittee hearings of the Small Business Committee on the Robinson-Patman Act, small business and the antitrust laws.

We are honored to have as our first witness this morning a distinguished practitioner in the law and the antitrust field, Mr. Frederick M. Rowe.

Mr. Rowe, we are privileged to have you with us this morning. Thank you for coming and for the time you have taken to prepare yourself this morning for this appearance.

If you will identify yourself fully for the purposes of the record, we will be happy to recognize you for such statement as you choose to give.

TESTIMONY OF FREDERICK M. ROWE, ESQ., KIRKLAND, ELLIS, HODSON, CHAFFETZ, MASTERS & ROWE, WASHINGTON, D.C.

Mr. ROWE. Thank you, Mr. Chairman. It is a privilege for me to be here.

My name is Frederick M. Rowe. I am a partner in the law firm of Kirkland, Ellis, Hodson, Chaffetz, Masters & Rowe in Washington, D.C. This year, I am chairman of the Section of Antitrust Law of the American Bar Association. For the past 3 years I have been chairman of the Council on Antitrust and Trade Regulation of the Federal Bar Association.

As to the subject matter of these hearings, I have published numerous writings concerning the Robinson-Patman Act and the Federal Trade Commission, beginning with an article in the Yale Law Journal in 1951 when I was a law student, and also including a treatise, "Price

Discrimination Under the Robinson-Patman Act," by Little, Brown & Co., in 1962, supplemented in 1964. From 1953 to 1955, I served as a conferee with the Attorney General's National Committee To Study the Antitrust Laws. Most recently, I was a member of the American Bar Association Commission To Study the Federal Trade Commission. As a private practitioner, I have over the years advised various clients in Robinson-Patman matters, have been general counsel of an industry association—GMA—since 1968, and have participated in many Robinson-Patman proceedings before the Federal Trade Commission and the courts.

I am pleased to respond to the chairman's invitation for my testimony on the subject of this committee's study of the Robinson-Patman Act—particularly in light of Chairman Dingell's opening statement announcing this committee's "intent to receive and consider all shades of opinion and to do so with the utmost objectivity."

I might also add that I have the utmost regard for Mr. Potvin, your committee's counsel, who has spoken before the American Bar Association, and who is a very eloquent and articulate professional staff member, for whose views I have great respect.

Mr. DINGELL. The Chair takes that last compliment very highly, because in that, Mr. Rowe, we are in entire agreement.

Mr. ROWE. Thank you, sir.

Needless to say, I am here today to present my own personal and individual views. I am not speaking on behalf of the American Bar Association or any other group, public or private nor of any client.

The chairman's assurances as to the objective nature of these hearings are particularly gratifying because of the highly emotional controversy which has attached to the Robinson-Patman Act from the day of its birth almost 35 years ago.

It is now a matter of historical fact, not criticism, that the Robinson-Patman Act was conceived in the distress of the Great Depression of the 1930's to preserve the independent wholesaler, retailer, and broker from the competitive inroads of the chains. During the twenties the chains, to achieve cost efficiencies, had pioneered the integration of distribution—by combining within one corporate organization the several functions previously performed separately by independent wholesalers, brokers, and retailers, thereby threatening to short circuit them out of business. At the same time, the larger chains were in a position to bargain for lower prices from suppliers, and to pass along the efficiencies of their integrated distribution to the price conscious consumer of the 1930's.

As aptly summarized some years ago by Dr. Arthur Burns, the new Chairman of the Federal Reserve Board, and one of the Nation's top economic scholars, the Robinson-Patman Act of 1936 reflected "the struggle between the older and newer organizations in distribution in which the older group sought protection from the State presumably because it was not prepared to rely on the outcome of competition."

In this aim, the act was the immediate successor to State antichain store laws, and the depression-born NRA Codes of Fair Competition, which imposed a variety of restrictions on discounts and rebates, and were held unconstitutional by the Supreme Court's famous Schechter decision in 1935.

As a matter of fact, I noted that yesterday the National Association of Tobacco Distributors filed a statement here which made the same point and said "it was the function of the Robinson-Patman Act to rescue and preserve those salutary and constitutional aspects of the NRA and to discard the dross and defects of that legislation which had caused it to be declared unconstitutional by the U.S. Supreme Court."

The emotional atmosphere of the Robinson-Patman controversy, which still lingers today, was dramatized by the legislative debates of three decades ago.

The opposing themes were vocalized then by two respected elder statesmen in the Congress today—the Honorable Wright Patman, for many years chairman of the Committee on Small Business, and the Honorable Emanuel Celler, long chairman of the Committee on the Judiciary and its Antitrust Subcommittee.

According to Mr. Patman's keynote remarks in 1935:

The day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. That is, the chain store system. So we have reached the crossroads we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist . . .

Mr. Celler maintained that "the mere mention of chains to some is like waving a red flag to a bull. They fail to realize that by striking at chains, as in this bill, they involve serious complications in other directions." In Mr. Celler's views, filed as the minority report of the House Judiciary Committee, "the consumer is made the goat." As he explained:

The advocates of this bill include many independents unable to meet competition which is easily met by their efficient fellow dealers, and as well wholesale grocers catering to such small dealers handling the basic necessity, food, and asking for unnatural restraints upon their most efficient competition. They searched high and low when they had the NRA for ways and means to the same selfish end. They want no restraints on themselves; they want them only applied to the other fellow.

. . . Unfortunately, housewives and the consumer generally are not organized. Their voice is not articulate. But retail grocers and the retail druggists, and the wholesalers catering to them, have banded together and have raised a lot of commotion and issued forth reams and reams of propaganda in support of this bill, but no thought have they given to the consumer. Indeed the consumer should be the main object of our care.

Mr. Celler concluded:

I am earnestly opposed to legislation such as that proposed in this bill, which is obviously inimical to the consumer, and intended, under cover of devious but innocent appearing wording, to assure profitable business to a trade class regardless of the efficiency of service rendered the consumer.

Since 1936, and over the next three decades, the act and these conflicting themes have been the target of innumerable critiques, debates, monographs, monologs, and dialogs before legal and legislative forums. A classic 700-page study of the act was published by Prof. Corwin D. Edwards, formerly chief economist of the FTC.

I don't know whether Dr. Edwards will be a witness before this group, but I commend his book. Dr. Edwards is a man of great stature and distinction who worked for a long time to prepare an economist's professional evaluation of the act.

Most of these studies have been critical of the act or its administration by the Federal Trade Commission, or both. The Justice Department Antitrust Division's chronic allergy to the act has been notorious. Although the Antitrust Division shares concurrent jurisdiction with the FTC over the civil enforcement of the Robinson-Patman Act, it has brought about a dozen cases—mostly criminal—in nearly 35 years, compared with over 1,400 Robinson-Patman cases by the FTC. Indeed, the Justice Department in key Robinson-Patman cases has publicly disowned the FTC's positions before the Supreme Court.

This committee is, of course, familiar with the recent reports of two Presidential commissions—President Johnson's Neal Task Force on Antitrust Policy and President Nixon's Stigler Task Force on Productivity and Competition—both comprising scholars of eminence and independence. Significantly, while diametrically opposed in outlook and recommendations as to key trade regulation issues of the day, such as our national policy toward industrial concentration and toward conglomerate mergers, both of these Presidential task forces made highly critical assessments of the Robinson-Patman Act and its administration, and proposed far-reaching legislative modifications.

In my view, more significant from the public policy standpoint than the Neal and Stigler task force reports, which have no official presidential status, were the recommendations of President Johnson's Council of Economic Advisers, transmitted by the Economic Report of the President to the Congress on January 16, 1969. The Council's report contained a brief but pointed analysis of legal restrictions on competition, as follows—page 108:

In spite of the Government's commitment to the strengthening of competitive markets, some existing laws may weaken competition. Most of these laws were adopted during the 1930s to relieve the especially serious impact of the depression on small firms in the distributive trades.

It then discussed Resale Price Maintenance, and I will quote briefly from this:

. . . The principal objective of resale price maintenance is to protect smaller concerns from their larger competitors. The prohibition of predatory practices is a valid objective of public policy. In practice, however, lower prices reflecting greater efficiency and lower costs cannot be called predatory. Moreover, there is no evidence that the efficient small retailer needs such special protection, which can freeze an inefficient market structure.

For these reasons, the Administration has consistently opposed legislation designed to extend resale price maintenance. Indeed, it is hard to see a continuing justification for the existing laws in today's prosperous economy.

I might interpolate at this point that I am of course familiar with the chairman's position with respect to fair trade laws. On the other hand there is a great parallelism in the attitudes of others toward these two statutes.

Mr. DINGELL. I am violently, vigorously, eternally and everlastinglly opposed to fair trade, or anything that smacks of such a thing. I think it is evil and very bad.

Mr. ROWE. The chairman's position on that subject is very well known to me and is a significant evaluation of the anticompetitive aspects of other legislation to the extent that they exist.

The Council's Advisers' report to President Johnson went on as follows with respect to the Robinson-Patman Act:

The Robinson-Patman Act is another important Federal law intended to protect the small from the large. The act attempts to prevent chains, mail-order houses, and other huge buyers from extorting preferential price concessions from suppliers.

Although public policy should be concerned with preventing improper use of the advantages conferred by sheer size, some evidence indicates that the Act has had the unintended effect of accentuating price rigidities in some markets. A seller may refuse to bargain on price with an individual customer by contending that under the law any concession granted to one buyer would have to be made uniformly available to all others. The law may conflict with the development of more efficient methods of distribution, such as integrating wholesale and retail functions or dispensing with independent brokers. By requiring proportionally equal treatment in certain promotional practices, the Act has discouraged experimentation with marketing techniques. It has been interpreted to prevent sellers from charging different prices in widely separated geographical markets.

And then the conclusion—pages 108 and 109:

A careful, reappraisal of the Act might suggest ways to focus its application more sharply on those particular forms of price discrimination that constitute a truly serious threat to competition.

Now, the eminence and status of the President's Council of Economic Advisers is of course manifest and well known. And I think it is significant that this report was transmitted by President Johnson to the Congress only last year reflecting the views, I would assume, of the administration with respect to the subject matter of this hearing.

My own personal views which I have expressed over the past 20 years have also been critical of the act and its administration. On the basis of a study published by Little, Brown & Co. in 1962, I came to the following here pertinent conclusions, among others:

(1) Contrary to the 1936 congressional objective to curb the "big buyer," the FTC's annals show that, despite more than 1,400 formal Robinson-Patman proceedings since 1936, only a minute fraction concern abusive practices by big buyers banned by section 2(f) of the act. On the contrary, section 2(f) was heavily brought to bear on small merchants, such as automotive parts distributors. Indeed, the overwhelming mass of Robinson-Patman enforcement proceedings since 1936 was aimed at smaller business firms. (This trend appears also in appendix E, pp. 209-217, of this committee's own printed hearings, showing the typical recipient of a Robinson-Patman order since 1962 to be an inconspicuous enterprise unfamiliar to the reader of Fortune magazine.) I invite your attention, Mr. Chairman, to that appendix, starting at page 209 of the committee's printed hearings. It starts off significantly with Aluminum Co. of America, but then as you read down the list you see such titans of the marketplace as Robilio and Cuneo, New England Confectionery Co., Bill the Distributor, Grabler Manufacturing Co., M. Degaro Co., Chemway Corp., Kimbriel & Co., Pride O'Texas Citrus Association, Lamin Sales Co., et cetera. And you can flip over through three or four or five pages of this appendix, and you see such names as Joseph A. Kaplan & Sons, National Parts Warehouse, Bill & Ruth Promotions, Julius Schmidt, Inc. Mister Pants, Inc., Modelia, Inc., Pat Fashions, et cetera.

I think that is a fair cross section of what this appendix contains. I believe it does confirm the point very significantly that the main impact of the act's enforcement with respect to formal complaint

proceedings has been against the smaller firms, and not against the giants of American industry.

Mr. DINGELL. Is the fact that the act has stopped predacious practices among small businessmen as well as the large, is that a defect in the law or in the administration?

Mr. ROWE. I would say with respect to that point it would be a myopia of administration to have the kind of imbalance this statistical record reflects, to aim at the smaller firm rather than the larger if in fact the larger firms are violating the statute.

Mr. DINGELL. This committee has as its goals two objectives: One, to look into the philosophy and construction of the antitrust laws; and the other is the question of enforcement. A lot of people have a hard time keeping these two separate. I am sure a man of your stature and ability and experience does not. But for the purposes of the record I simply wanted to be sure that these particular comments are in an appropriate and proper perspective.

Mr. ROWE. I would say, Mr. Chairman, that this imbalance is a matter of administration rather than the statutory text, and even more so, the legislative intent. And in a sense, they are a paradox, in the light of the obvious and manifest legislative intent of 35 years ago.

Mr. DINGELL. Of course, if I were a small businessman being afflicted by predacious business practices by competitors I wouldn't care, I think, very much whether they were predacious practices on the part of my small next door neighbor or on the part of the big chain store or on the part of the giant merchandising establishment.

Mr. ROWE. I should point out, Mr. Chairman, that of course this enumeration is not to imply that Mister Pants or Billy and Ruth, et cetera, were guilty of predacious practices. As a matter of fact, a closer study of these dockets will indicate these were not predacious activities at all, but rather that these were largely proceedings brought under the so-called per se provisions of the act with respect to advertising allowances or brokerage commissions. So there is no element of predation at all. I certainly did not imply that these people who are listed here in such profusion were predators in any sense of the word.

Mr. DINGELL. **Mr. Potvin.**

Mr. POTVIN. Mr. Rowe, would it not be fair to say that at least that portion of the list that you read that sounded well, garment industry in nature, "Mister Pants" and that type of thing, are quite apt to be a part of a particular industrywide proceeding, or as a result of an industrywide proceeding; is that not correct?

Mr. ROWE. The garment people were part of an industrywide approach, where in fact more than 100 proceedings were brought. But I have in mind a great number of proceedings listed in this appendix which lists cease-and-desist orders since fiscal 1962 to date, and the overwhelming majority has nothing to do with these garment proceedings. For example, Oppenhauser Brokerage Co. or the California Fruit Exchange or the National Police Gazette which I see here, and the Perfection Gear Co.—

Mr. POTVIN. Mr. Rowe, you are eminently correct. I certainly was not trying to erode the validity of your statement. That was merely prefatory to the next question, which is this. On yesterday we received further testimony to the extent that industrywide proceedings

are probably, all things considered, much more constructive than a case-by-case basis. And I was hoping that at some point in your remarks you would comment on that.

Mr. ROWE. Let me comment on it right now, if I might.

Mr. POTVIN. And also if convenient, would you cover—necessarily when you use an industrywide approach, the large and the small firms are, of course, equally involved, and typically small firms would outnumber larger competitors.

Mr. ROWE. Yes. From the standpoint of economical and fair and equitable enforcement, it is, of course, desirable not to discriminate in enforcement against one firm, leaving the others to roam free and pick his economic pockets, so to speak, without any restriction. That is a desirable objective of effective and efficient law enforcement.

On the other hand, there is some danger of abuse in industrywide enforcement, to this extent. After all, the Robinson-Patman Act is a statute which is addressed to prices and price movements by competitive sellers, and thereby touches on a very sensitive nerve in a free enterprise economy which prides itself on fluid prices and ease of price variations and price changes.

Now, there have been situations, and there can easily be situations where members of an industry develop, let us say, a distaste for overly vigorous competition. That does happen from time to time in American industry. And one way to legislate that distaste into a legal prohibition could be to apply to the Federal Trade Commission on an industrywide basis to issue restrictive orders covering all sellers.

The effect of that would be tantamount to a cartel with Government blessing.

Mr. POTVIN. Would you care to comment on one specific proposal that Mr. Van Cise made yesterday, sir. He suggested—first, I may, for the record, say this. His proposal was illustrated in his remarks by the guidelines in the *Meyer* case.

Mr. ROWE. Yes.

Mr. POTVIN. And he suggested that this was an excellent set of guidelines, but that it lacked teeth. To add teeth he suggested the use of 6(b) procedures. Would you care to comment on that in the context of your prior comment?

Mr. ROWE. Yes. And let me first illustrate the point that I was making by an example in the actual annals of the Federal Trade Commission, where there has been a situation where industrywide enforcement could give rise to a cartel type of restriction with Federal Trade Commission sanction and blessing.

The case I have in mind involves the carpet industry, which in the latter part of the 1930's was subject to an antitrust proceeding by the Department of Justice which charged collusion in an industrywide arrangement to get rid of discounts. Now, that case was settled with a consent decree under the antitrust laws which enjoined the various participants in the case from agreeing with each other to cut out discounts *. And as you know, discounts can be a very vigorous competitive force.

Now, over a decade later, some of those same parties had proceedings with the Federal Trade Commission to enjoin these discounts, and

**United States v. Institute of Carpet Manufacturers, et al.*, 1940-43 Trade Cas. par. 56,097 (S.D. N.Y. 1941).

there was, as I understand it, an effort to broaden these out as an industrywide discount restriction with everyone taking an order from the Federal Trade Commission.

Now, to me the distinction becomes rather thin at that point, as between an agreement to abolish discounts, which is a violation of the antitrust laws as price fixing, and a concerted multiple-party effort to, in effect, volunteer before the Federal Trade Commission to take cease-and-desist orders proscribing the same thing.

So my point as to that industrywide enforcement being susceptible to abuse is not a figment of the imagination, but I think it has a basis in fact.

Mr. DINGELL. Of course, on that matter—this is rather like a group of persons deciding that they are going to take essentially an order to court, a consent decree, agreeing to do something that is violative of another statute, perhaps antitrust laws, or possibly food and drug laws, or conceivably some of the statutes dealing with the pricing of meat and things of this kind under the Packers and Stockyards Act, and then the court sanctioning it and affording shelter. This is very bad administration. And we set up courts and the Federal Trade Commission to avoid this thing.

I would be interested to know if this is a practice going on in the law. Because if it is, it needs some pretty vigorous correction by the Congress.

Mr. ROWE. Let me point out another example, Mr. Chairman, of the same situation, which is well known to the antitrust bar. These are the cases concerning promotional allowances in the garment industry to which your counsel had reference a moment ago. This too was an industrywide enforcement situation where in effect the various industry members came before the Commission and bared their breasts and said, in effect, enjoin me from giving advertising allowances. Now, the practical effect of such a situation, of such an industrywide series or orders preventing discriminatory advertising allowances, could be tantamount to an agreement among industry members to cut them out.

Mr. DINGELL. Of course, the Federal Trade Commission has the responsibility, not just of looking at the particular law that might be in question, but also of harmonizing its order with all other Federal statutes. I find this a novel question, one that I have never given thought to, and one that I find to be very troublesome. I would like to have further comment from you, Mr. Rowe.

Mr. ROWE. It is a troublesome matter, Mr. Chairman. I think it indicates the sensitivity of the competitive price movements to which the Robinson-Patman Act addresses itself, and illustrates the danger that unthinking, or unsophisticated, or not fully perceptive enforcement, might do more harm than good and result in a cure that is worse than the disease.

Mr. DINGELL. Of course, my interpretation of the law is that the Robinson-Patman will be construed in the light of circumstances as well as in the light of all other Federal statutes, and that an order issued under Robinson-Patman is not going to sanctify an abuse that would be violative, say, of the Sherman Act or Clayton Act.

Mr. ROWE. I can only say that I enthusiastically share such sentiments, and if those sentiments had been adopted by the Federal Trade Commission over the last 25 years of the act's administration, many

fewer articles would have been written and many fewer debates and dialogs would have been held as to the impact of the act on our competitive economy and on the fluidity of price movements. Unfortunately many have concluded, including myself, that that has not been the case, and that much of the administration of the act has not pursued the particular objectives which you stated, which is to harmonize the entire body of antitrust laws into one coherent and meaningful whole.

Mr. DINGELL. Here we have what is clearly an administrative problem as opposed to one dealing with the fundamentals of the statute, in other words, the substance of the statute, am I correct in that interpretation?

Mr. ROWE. You are eminently correct, Mr. Chairman. As a matter of fact, two commissioners dissented from this action, which had an industrywide scope, with dozens of orders going out to the garment industry, and protested very vigorously that this did have the restrictive and cartelistic effects of prohibiting the granting of advertising allowances on a competitive basis in that industry. So the matter was raised within the Commission and was brought forth to public knowledge by these dissenting opinions.¹

Mr. DINGELL. I see.

Mr. POTVIN.

Mr. POTVIN. Mr. Rowe, first, as you pointed out quite eloquently in your book and elsewhere, the Robinson-Patman Act is, first of all, somewhat difficult to analyze, because it is directed at the conduct of buyers but couched in language directed to sellers.

Now, as you pointed out a few moments ago, particularly in that garment industry proceeding, the vast majority of them are indeed small firms. And isn't one of the reasons for going the industrywide route here not an evil cartelization at all. But illustrates the fact that Mr. Pants, for example, one of the firms you named, is just going to have an inordinately difficult time looking Mr. Macy or Mr. Gimbel in the eye and saying, we are not about to give you a discriminatory price. Isn't it this salami effect that you are trying to prevent with that type of proceeding, really?

Mr. ROWE. That is entirely possible, Mr. Potvin. And I think it is a legitimate point to be made. Whether in that situation Mr. Pants was being coerced by Mr. Macy I don't have the slightest idea.

Mr. POTVIN. I make no such allegation. It was an observation.

Mr. ROWE. I think it is a valid point. On the other hand, I don't believe that that is the complete explanation.

Mr. POTVIN. I think in classic form we have now perhaps expressed the two conflicting points of view on that precise situation.

Mr. ROWE. I think that is a fair statement.

Mr. POTVIN. Thank you.

Mr. DINGELL. Don't we here have something that really has been a bit overlooked, and that is the need to have uniform rules so that everybody plays by the same scorecard and the same set of rules.

Mr. ROWE. I think that is a desirable objective, Mr. Chairman.

¹ Abby Kent Co., et al., docket C-328, et al. (Dissenting statements, Jan. 2, 1963); see also 1965-67 CCH Trade Reg. Rep. Transfer Binder, par. 17,310, p. 22,466 (Aug. 9, 1965).

MR. DINGELL. Whether you are talking about Balkanization of the country into small trading areas, or whether you are talking about treating one particular industry different than another industry, or treating one particular competitor different from another competitor in the same industry or in the same town differently, isn't it fundamentally bad to have one set of people playing by one set of rules and another set of people playing by a different set of rules, and isn't this why industrywide or nationwide rules are highly desirable in antitrust and other areas?

MR. ROWE. They are desirable, Mr. Chairman. I agree that equitable enforcement and uniform rules of the game are desirable. My only point was that with respect to rules that affect the price mechanism where there are no automatic rules of legality or illegality—because, after all, every price discrimination under the Robinson-Patman Act is only illegal if it injures competition—it may be very much more difficult than perhaps in the field of false advertising to set a uniform rule or floor beneath which suppliers may not fall, short of violating the statute.

I would make this point too with respect to the garment industry. I don't know, in terms of administration, assuming Mr. Pants was favoring Mr. Macy and the other garment people were, whether, if that is the case, it would not be more economical to bring a case against the coercive big buyer. If in fact he was violating the statute, that might be a better way and a more competitive and administratively more efficient way to cut out something that was illegal, rather than having the suppliers coming in en masse and baring their breasts and saying, sue me.

MR. DINGELL. Of course, in this matter you do have the two options. You do have on the one hand the option of proceeding against the buyer. And on the other hand you have the option of proceeding against the seller. And this would be a question of good administration again. The Department of Justice might be compelled to move in one direction, and the Federal Trade Commission might be compelled to move in another. And we would hope—although that hope is sometimes more in the breast than in the reality—that there would be coordination between the two agencies that would result again in a unified approach.

MR. ROWE. I agree. And there should have been more than there has been. As I pointed out, the Justice Department in key situations has disowned the Federal Trade Commission's positions before the Supreme Court.

MR. DINGELL. You are raising here a very interesting question. Is it proper for an agency of the Federal Government like the Department of Justice to take the position that they are not going to enforce the Robinson-Patman Act because they don't like it or don't agree with it?

MR. ROWE. I believe the agencies have worked out a little bit of a division of markets among themselves. The Justice Department has in effect left the Robinson-Patman enforcement to the Federal Trade Commission even though by statute they have concurrent jurisdiction.

Now, I would assume that there is nothing improper about this, for this reason. Certainly one of the real concerns of everyone these

days is the matter of priorities, because one cannot solve all of the problems of the world with finite resources.

Mr. DINGELL. Of course, the agency that fixes national priorities and goals is the Congress. We write the law, and hopefully the administrators downtown carry it out, and carry it out the fashion we intended. We are often disappointed in this. But nevertheless this is the fundamental constitutional theory under which we operate.

Mr. ROWE. I have no problem whatever with that concept, Mr. Chairman. Congressional surveillance of this situation and oversight, and reports by the agencies to the extent such problems exist, would make for, in my view, better administration compatible with the constitutional scheme which you have outlined and which is certainly correct.

Mr. DINGELL. We intend to have the Justice Department up here to do precisely this, and we do intend to have the members of the Commission up here for the same purpose.

Mr. ROWE. With respect to industry-wide enforcement, one final point, if I might, because it is pertinent. There is certainly the option of going after 200 sellers rather than one buyer. But I think what should be pointed out in that situation is that there is no adjudication that the practice was illegal in the first place when 200 suppliers come in and say, sue me, put me under an order. Whereas if there is a suit against the buyer, then there is an adjudication as to whether the thing is illegal in the first place. And again, I point to the danger of a situation where people can come in en masse and say, restrain me, Mr. FTC, because I don't wish to give these discounts.

If an order issues in these circumstances, without any adjudication of illegality, perfectly lawful competitive practices may be curbed in an undesirable way.

Mr. POTVIN. Mr. Rowe, this whole matter, of course, is further indicated, as you point out on page 428 of the original edition of your book. And I am quoting:

"Also the Federal Trade Commission has treated a buyers receipt of discriminatory concessions through promotional benefits as outside the reaches of section 2(f), but recognizable—as you point out—under section 5 of the Federal Trade Commission Act." Would you care to comment on the effects of that—I honestly don't remember whether you said it or the chairman said it—the equal ability to sue many as well as Mr. Pants.

Mr. ROWE. Yes. I believe that inasmuch as the Commission can pursue buyers exacting discriminatory promotional payments under the Federal Trade Commission Act, there is no enforcement gap, and the Commission could have sued the buyers to establish the illegality of the practice under section 5 rather than taking the alternative of having all of these suppliers coming in and say, put me under an order.

Mr. POTVIN. That, of course, while a related matter—I started to say antitrust matter, which section 5 is not in the technical sense—is not a matter of Robinson-Patman enforcement.

Mr. ROWE. No. But the remedy was there, and it was a matter of an available option, which went in one direction, but could have gone from the standpoint of administrative efficiency in a more effective direction to adjudicate a practice as illegal rather than having a whole industry agree to cut it out without any determination of its illegality.

Mr. DINGELL. There is a quaint practice that goes on in antitrust law all the time, every consent decree virtually says, between the Justice Department and the court and the individual charged, we didn't do it, by our going to agree that we ain't going to do it in the future. So this quaint practice is not limited to just Robinson-Patman, but it is something that practitioners of the antitrust have long since begun to engage in industrywide, if you wish the term.

Mr. ROWE. I agree thoroughly, Mr. Chairman. But in terms of the antitrust laws exemplified by the Sherman Act, there might be a decree to quit colluding, whereas in a case of the Robinson-Patman Act there might be an industrywide decree to quit competing. That is the danger of such a situation.

Mr. DINGELL. You say, Mr. Rowe, quit competing. But really what they agree to under Robinson-Patman is to quit competing in fashions not consonant with the Robinson-Patman Act, so there is a difference. This doesn't stifle all competition, it simply stifles certain enunciated kinds of competition; isn't that it?

Mr. ROWE. That is true, Mr. Chairman.

Mr. DINGELL. Vigorous competition remains.

Mr. ROWE. My only point was, with this situation, that the matter is susceptible to abuse. I don't mean that this is a cardinal, overriding issue of contemporary concerns, I merely wish to make that one point in regard to Mr. Potvin's statement.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. I would like to clarify one thing that has been touched on. On page 5, you state:

"The Justice Department Antitrust Division's chronic allegry to the act has been notorious." And we discussed for a second the fact that the Justice Department and the Federal Trade Commission have current jurisdiction over the Clayton Act. Simply because of the fact that the two agencies decide that one should administer one act or one section of an act doesn't necessarily mean that there is an aversion on the other department's part in refusing to enforce an act, does it?

Mr. ROWE. My statement as to the aversion is based on more than the statistics. It has been a matter of common knowledge in the anti-trust bar that the Justice Department has had no particular brief for the Robinson-Patman Act, going back many, many years to the days of Thurman Arnold—

Mr. DINGELL. Who opposed it in its incipiency up here?

Mr. ODEN. You could say the same thing with mergers, for instance, where there has been an agreement over the years that the Federal Trade Commission would handle mergers in the concrete industry, which is highly concentrated, but that wouldn't necessarily imply that the Justice Department didn't feel that concentration in the concrete industry is good or bad.

Mr. ROWE. No; but as you know, with respect to mergers, both agencies, and very properly so, go after good merger cases like hungry fish.

Mr. ODEN. I believe over the years the Commission has staked out certain industries which they deal with exclusively. And I think concrete is probably one. As far as I can remember, the Federal Trade Commission has brought I guess, almost every concrete case as far as mergers that I know of.

Mr. ROWE. If your point is that the agencies divide jurisdiction, they have done that in the merger field, although it is not a complete

division of markets. Every once in a while the Justice Department will sneak over and take a case in one of those industries. And they have had the same division of markets in Robinson-Patman, because as I indicated, the Justice Department has brought about a dozen or so Robinson-Patman cases over a 30-year period. But the aversion is reflected in the statement filed by the Solicitor General before the Supreme Court to some of the key positions, plus, as I say, the general antitrust attitude of the Department, as reflected over the years.

Mr. ODEN. I wonder if I could clarify one thing. You say they brought a dozen. Would it be true to say that normally when the Justice Department brings a Robinson-Patman case that it is normally a secondary issue to another antitrust violation.

Mr. ROWE. I wouldn't wish to generalize. I know in a number of those cases that the Justice Department proceedings have involved both Sherman Act and Robinson-Patman Act counts.

Those have been in the case of predatory pricing practices, which, as you know, may be reached by both the Sherman Act and the Robinson-Patman Act by way of criminal remedies, and the Justice Department has pleaded more than one count, and thereby brought both statutes into the picture. But I don't believe that has been exclusively what the Justice Department has done over the years.

With respect to the statistical aspects of the enforcement and the emphasis on proceedings against smaller suppliers, I of course find it difficult to say whether these data indicate that larger firms are complying better with the act than smaller firms, which is entirely possible, or whether the big firms have learned better to plan around its restrictions. Obviously bigger firms can afford more astute counsel than smaller firms, and so perhaps they can find their way better around the maze than someone who is not so well advised.

Also, it may be possible that cases against smaller firms are easier to win and they can rack up impressive litigation statistics. Interestingly, four important Robinson-Patman cases against large national oil companies were voluntarily dismissed by the Commission in 1964, and were followed up by an industrywide hearing which produced a report but no cases.

Second, key Federal Trade Commission interpretations of the act, not compelled by its text, can specially prejudice the growth of smaller firms. Thus, the FTC's "price by use" doctrine, applied in numerous pricing cases, holds that whenever a wholesaler or jobber grows beyond a single-stage operation of reselling to retailers, and combines wholesaling and retailing facilities and functions, he must pay the same price as other "retailers" who have not invested in comparable wholesale or jobber facilities and do not perform the same distributive functions. In effect, this discriminates against such distributors, by making them pay the same price even though they perform extra and valuable distributive functions. As criticized before the Supreme Court by the Department of Justice, which opposed the FTC's position, this "interpretation of the Robinson-Patman Act *** could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical integration of concerns engaged in the wholesale and retail distribution of merchandise."

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Rowe, first, by way of background, in your reference to the price-by-use doctrine, the way this works as a practical matter is that if I am an integrated wholesaler-retailer, I would quite probably in applying that doctrine use one of two systems, the credit memo or the debit memo. Let us assume the latter. That would mean that I would buy it as a wholesaler and send in memos on only those items which I sold at retail, and I would then be debited the difference between the wholesale price and the price that they were charged in selling directly to another retailer; is that roughly correct?

Mr. ROWE. My point would be broader than that, Mr. Potvin. Let me cite another example out of an actual case—the *Standard of Indiana* case, the famous *Detroit* case involving oil jobbers. The situation was there partly as follows. You had an oil jobber who decided, because he wanted to broaden his business, to put a retail pump in front of his bulk plant. Now, he did the same work that he did previously as a jobber, he had the same bulk plant, he ran the same trucks, he had the same investment, he hired the same secretaries, he kept the same books, but because he put a gasoline pump in front of his jobber facility, at that moment by some magic of law he was treated as a retailer, and he had to pay the same price *prima facie* that every other retailer who didn't have that facility.¹

That illustrates the "price by use" principle which, from the standpoint of Robison-Patman interpretation, would suddenly convert a wholesaler into a retailer because he also has a retail facility, and making him pay more because of that.

Mr. POTVIN. Of course, you have chosen an industry which is structured considerably different than most. And certainly the role of the jobber has long entailed a dual distribution type of thing.

But let us talk for a moment, let us say, about hardware and automotive parts. If I buy from the manufacturer, being a wholesaler, and sell that particular widget at retail, what additional functions have I performed? You say even though they perform extra invaluable distributive functions, as to that widget that I bought direct and sold out my front door at retail, what function did I perform that a retailer buying direct from the manufacturer down the street would not have performed?

Mr. ROWE. Mr. Potvin, I think you have to do this on the basis of a case by case—

Mr. POTVIN. If you are going to be compensated in one manner or function, you had better perform it so I think this is rather cardinal here.

Mr. ROWE. I agree that functions rather than labels should control. And that has been my problem with the "price by use" doctrine, because it goes by label rather than functions.

Mr. POTVIN. But as to that widget again, if you are an automotive parts wholesaler, you direct buy this widget along with the rest of the gross, and this particular widget you sell out your front door to someone coming in off the street at retail. Can you tell me what actual functions that are extra and valuable you have performed that a direct buying retailer down the street would not have performed?

Mr. ROWE. I am not familiar enough with the hardware industry to pontificate by way of a general statement. I would agree with you

¹ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951) (setting aside FTC order.)

in principle that where there is no extra function there should be no recognition, and where there is an extra function there should be recognition.

Mr. POTVIN. Then we are in agreement that price flexibility is a useful concept in industry?

Mr. ROWE. By all means, flexibility, realism, and compatibility with antitrust objectives.

Mr. POTVIN. Thank you, sir.

Mr. DINGELL. Mr. Rowe, the Chair notes that with sorrow that I have got to go down to another committee where I have been called. I have read your statement with interest, and I commend you for it. The Chair is going to ask Mr. Hungate to preside. And I do apologize. I intend to follow very carefully the proceedings even though I have to be elsewhere. And I hope you accept my apologies.

Mr. ROWE. I appreciate the courtesy, Mr. Chairman.

The same point which I was making with respect to penalizing integration, so to speak, also applies to the numerous Federal Trade Commission applications of section 2(c), the so-called brokerage clause of the statute. These particular applications have prevented smaller firms organized in buying groups in order to match the purchasing efficiencies of chains from securing lower prices through the elimination of needless broker's fees. For example, the Court of Appeals in the *Central Retailer-Owned Grocers* case agreed with the Commission's Chairman that:

Combination in one form or another by small firms may be essential to their survival, particularly in those industries characterized by massive aggregate of corporate power. The growth of the giant food chains, for example, revolutionized the behavior of the small independent grocery stores. They were quickly faced with the alternative of constructing cooperative buying arrangements or extermination. Certainly many independent food stores long ago would have withered before the competitive threat of large chains had they not formed retailer-owned cooperative wholesalers; stores with combined retail sales of over \$7 billion are now affiliated with such jointly-owned wholesalers.

That is a statement by the chairman of the Commission.

Mr. HUNGATE (now presiding). May I ask, what is your view of that statement, Mr. Rowe?

Mr. ROWE. I have no reason to doubt the accuracy of it. I think it is a fair statement.

Mr. HUNGATE. Have you ever had occasion to examine one of the leases or contracts, I think they are usually in the form of leases, of these independent food store co-op groups?

Mr. ROWE. I don't believe I have ever scrutinized such a lease, no, sir.

Mr. HUNGATE. I think they provide that you buy from one place or else. That is overstating it a little bit, but not much. They specify the percentages, which are rather high, and you buy a certain percentage of your meat and a certain percentage of your groceries and a certain percentage of so and so from the parent office. And I know when I first had a chance to work on one I was somewhat disappointed in the degree of independence that was left to the independent grocer.

Go ahead, please.

Mr. ROWE. Nevertheless, said the court in that case, "in the case at bar the Commission would drive such groups out of existence."

Acknowledging that the retailer-owned buying group was able to secure lower prices from its suppliers through purchasing economies, the court was not willing to:

Declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer, by entering into the arrangement with Central which made them stronger in their competition with large chain stores.

Mr. HUNGATE. Counsel would like to ask a question.

Mr. POTVIN. Mr. Rowe, is it not true that one of the anomalies of the antitrust laws generally is that they are in essence of a two-bladed sword, that is to say, while they protect in many ways the small businessman, they of course can always be used against him? And as you have pointed out, the so-called numbers racket has been endemic from time to time in both the Department of Justice and the Commission—as an example, in the petroleum industry, where everyone evidently reads Platt's Oil-Grain to see what they are going to charge today, we see that 13 service station operators in the San Fernando Valley did a stupid thing and declared in a newspaper ad, that suppliers to the contrary notwithstanding, we are all charging 38 cents, and they were before a grand jury by the end of the month.

So that is not really confined at all to the Robinson-Patman Act, this two edged nature, is it.

Mr. ROWE. No. But my point would be, Mr. Potvin, that the anti-trust laws should be color blind and numbers blind. I don't believe they should have special favors or special nonfavors for small business and large business. I believe they apply to all business alike, and the small business of today is the large business of tomorrow.

Mr. POTVIN. In an economic sense, sir, what you were doing here was—what I was receiving, I trust it was what you were transmitting—was that the Robinson-Patman Act is making it difficult for smaller firms to form countervailing power. And my point, in response to that, for your comment, is, but that is true of the antitrust laws in general. As an example, in a highly competitive market it might indeed be helpful for the participants, for a group of little guys to get together and price fix, but the Sherman Act will not let them do so.

Mr. ROWE. I am not pleading for their immunity, Mr. Counsel, at all. I was addressing myself to the point that in the view of some, the Robinson-Patman Act and its administration has been a Magna Carta of small business in particular. And I made the point to indicate that "it ain't necessarily so."

Mr. POTVIN. No more so than with any of the rest of the antitrust laws.

Mr. ROWE. Nor should it be so, in my view.

Mr. POTVIN. Let me ask this, Mr. Rowe, before we leave this point. You have talked about vertical integration. Could you give us your views on whether you feel the Commission has been sufficiently aggressive in moving against dual distribution? I would remind you that another subcommittee of the House Small Business Committee some years ago had documented cases such as the following. An electrical appliance integrated wholesale house was selling the same item in the same quantity at a lower price to retailers than the manufacturer was at the same time and in the same market selling to wholesalers.

Despite this, and the urging of then Congressman James Roosevelt and Senator Russell Long and others, that section 5 be tried on for size, it has not been done. Would you care to comment?

Mr. ROWE. I am not sufficiently familiar with those particular facts, Mr. Potvin, to have a view as to whether the Commission was aggressive enough or overaggressive, I just don't know the facts. This is an area where it is peculiarly perilous to speculate based on inadequate facts. And I just do not have the facts.

Mr. POTVIN. Would you not concede, sir, that the particular factual situation that I have given you would make it literally impossible for that wholesaler to compete in such a market?

Mr. ROWE. I really couldn't, other than to say that there is no prohibition in the antitrust laws anywhere on dual distribution. In each case price differentials must be adjudicated based on competitive facts under one of the existing antitrust statutes.

Mr. POTVIN. Would it not then strike you as a patently clear case of unfair competition.

Mr. ROWE. It doesn't strike me one way or the other, Mr. Potvin, I regret.

Mr. POTVIN. Thank you, Mr. Rowe.

Mr. HUNGATE. May I inquire?

I appreciate your statement and the depth to which you have gone into this. And I would just like to put a problem and get your feeling on it. I think the situation that goes forward, since we have touched on the independent grocer and the large chain—an expansion is necessary, additional parking, additional building, growth—that is, what we have been acquainted with for the last 20 or 30 years. The local home owned grocer is urged to buy real estate, he has to buy property, perhaps, to build a building, a parking lot. There is a loan available from the large independent nonchain co-op, they can loan the money—this takes lots of money, more money than most of your smaller merchants are going to have. The local merchant buys the land, puts up the building, and receives a somewhat attractive loan from the co-op, and in return he leases to the co-op—you follow me, that is how he is going to pay the loan off, he leases this building, the local merchant buys it with money he borrows from the co-op, he then leases back from the co-op, and that is how he is going to pay off his debt, and they then lease back to him, the actual local merchant that is going to operate, and in that lease that is where the provisions come in, that usually buy at not less than 80 percent of such and such a goods, and not less than so much for your fresh produce, and so on, and if advertising campaigns are conducted you will take part in them, and if we suggest a loss leader in the Thursday paper it will be throughout the area and you will comply, and if you fail to do so on such a number of times you lose your lease and perhaps your note becomes due. Do you have any comment on that? Do you think that comes within the act?

Mr. ROWE. Based on the facts that you have outlined, Mr. Hungate, I believe they may need a good antitrust lawyer. I don't want to condemn the practice and I don't want to approve the practice, but it certainly seems to bear antitrust overtones so that a good antitrust lawyer might make a contribution there.

Mr. HUNGATE. If that poor grocer had had one he would have been better off.

Go ahead, please.

Mr. ROWE. No. 3 in my conclusions based on my 1962 study, I found that strikingly absent in the Federal Trade Commission's 30 years stewardship of the Robinson-Patman Act was the charting of priorities, policy, or planning directions. Upon expert assessment of economic and marketing factors, the Commission could have oriented the act's reach toward some concrete policy goals—the legislative aim to curb discriminatory exactions by big buyers, or some other acceptable public objective. Instead, the Commission seemed preoccupied with litigation statistics, unrelated to any overall plan or enforcement goal.

In short, the Federal Trade Commission, after more than a quarter of a century of Robinson-Patman enforcement, had not faced up to these fundamental questions of public administration: What is the purpose, individually and collectively, of Robinson-Patman proceedings in particular fields? What have over a thousand Robinson-Patman cases accomplished? In light of the lessons of the past, where should we be going from here?

According, I stated five years ago that:

The policy dilemmas of the Robinson-Patman Act and the paradoxes of its administration cry for fundamental reassessment in a great debate. Although Congress to date has shown scant inclination for Robinson-Patman reform, Congress could provide the prime setting for reappraisal of the Act near the seat of political power. The legislative forum, moreover, would muster the widest spectrum of relevant viewpoints—business firms and associations, consumers, scholars, and public officials concerned with the antitrust laws and the promotion of competition.

Such a great debate should consider among other things, (1) whether in an age of mass distribution and material abundance, it remains sound social or economic policy to protect traditional channels of distribution from competitive inroads; if so, (2) whether the Robinson-Patman Act, as administered, attains this or any other visible policy benefiting the American public; and in any event, (3) whether and how the Act or its administration can be improved to ensure the attainment of currently acceptable policy goals.

Obviously, such a reappraisal today would specially consider the impact of the act's enforcement on the consumer's interest in efficient distribution and lower prices in a critically inflationary era, straining both the Nation's and the housewife's budget.

Although my own study dates back several years, I know of no supervening development warranting a change in my views.

Indeed, recent years have seen a deepening crisis in Robinson-Patman administration by the Federal Trade Commission to which the legal profession and the business community must look for guidance. This administrative impasse was signified by a dramatic slowdown of formal Robinson-Patman complaint proceedings under the Robinson-Patman Act since 1964, coupled with a growing inability of the Commission to reach any consensus as to enforcement objectives or the proper interpretation of the statute. Important Robinson-Patman cases have produced four separate opinions by the five Commissioners in reaching a decision, with dissents, concurrences, and partial dissents or concurrences, leaving the law in uncertainty and the bar in confusion. For example, the Commission's most recent key Robinson-Patman pronouncement, issued December 1, 1969, contained four separate opinions and took 20 months from the date of argument for the Commissioners to gestate, in judging pricing practices dating back to 1962 and 1963.

That was the case against Beatrice Foods and Kroger.

In 1968, Mr. Justice Harlan of the U.S. Supreme Court pointedly protested in the famous *Fred Meyer* case, where the Court promulgated a new statutory interpretation as to the promotional obligations of suppliers, over 30 years after the act's passage:

No doubt, the broad purpose of the Act was to protect small sellers from the advantages their larger competitors can obtain through greater buying power. In implementing this purpose, however, the statute imposes a hodgepodge of confusing, inconsistent, and frequently misdirected restrictions.

"This course of action here and in similarly opaque cases might at least encourage the Congress to give this notoriously amorphous statute the thorough overhauling that has long been due.

Justice Harlan noted with approval the admonition of Judge Henry Friendly, an eminent and respected jurist, that—

"The tiniest fraction of the time spent by lawyers, legal writers, administrators, and judges in an unsuccessful endeavor to elucidate the obscurities of this statute would have sufficed to put the house in order once the problems were revealed; but that time has not been spent."

For those reasons, I support the recommendations of the American Bar Association Commission to study the Federal Trade Commission pertaining to the Robinson-Patman Act. In my view, the ABA Commission correctly proposed, in line with the 1969 recommendations of the President's Council of Economic Advisers, a study and appraisal of the Robinson-Patman Act, in light of its compatibility with antitrust objectives, and with due regard for the consumer interest in distributive efficiency and lower prices in an era where inflation is a top civic concern.

On the basis of such an in-depth study and report, for which the FTC is ideally suited in terms of its congressional reporting mandate, accessible information, manpower, and economic expertise, specific legislative reforms could be considered and evaluated by the Congress.

I believe the Commission and its economic staff should have made such a report to the Congress long ago. I might say that I have read in the papers that there is some kind of underground report of the Federal Trade Commission afloat somewhere. I have not had a chance to examine that report, and I am assuming that it will be made a part of the record of this hearing.

With a factual and objective Federal Trade Commission study and report, explored and considered in public hearings, the Congress might provide the Commission with an updated and current mandate harmonizing the 1936 act with today's needs—in terms of today's national priorities, including some cost-benefit estimate of over 1,400 Robinson-Patman proceedings measured against identifiable aims and results. I would offer my personal assistance for such a task, and am convinced that the antitrust bar would likewise offer its resources and cooperation.

In conclusion, I welcome this committee's inquiry, thank you for your courtesy, and trust that this committee's work may foster a broader understanding of the problems surrounding the Robinson-Patman Act, as well as a measure of sympathy for those charged with statutory enforcement and compliance.

(The complete statement follows:)

STATEMENT OF FREDERICK M. ROWE

My name is Frederick M. Rowe. I am a partner in the law firm of Kirkland, Ellis, Hodson, Chaffetz, Masters & Rowe in Washington, D.C. This year, I am Chairman of the Section of Antitrust Law of the American Bar Association. For the past three years I have been Chairman of the Council on Antitrust and Trade Regulation of the Federal Bar Association.

As to the subject matter of these hearings, I have published numerous writings concerning the Robinson-Patman Act and the Federal Trade Commission, beginning with an article in the Yale Law Journal in 1951 when I was a law student,¹ and also including a treatise, "Price Discrimination Under the Robinson-Patman Act," by Little, Brown & Company in 1962, supplemented in 1964. From 1953 to 1955, I served as a Conferee with the Attorney General's National Committee to Study the Antitrust Laws. Most recently, I was a member of the American Bar Association Commission to Study the Federal Trade Commission. As a private practitioner, I have over the year advised various clients in Robinson-Patman matters, have been General Counsel of an industry association (GMA) since 1968, and have participated in many proceedings before the Federal Trade Commission and the courts.

I am pleased to respond to the Chairman's invitation for my testimony on the subject of this Committee's study of the Robinson-Patman Act—particularly in light of Chairman Dingell's opening statement announcing this Committee's "intent to receive and consider all shades of opinion and to do so with the utmost objectivity." Needless to say, I am here today to express my own personal and individual views. I am not speaking on behalf of the American Bar Association or any other group, public or private, nor of any client.

The Chairman's assurances as to the objective nature of these hearings are particularly gratifying because of the highly emotional controversy which has attached to the Robinson-Patman Act from the day of its birth almost thirty-five years ago.

It is now a matter of historical fact, not criticism, that the Robinson-Patman Act was conceived in the distress of the Great Depression of the 1930's to preserve the independent wholesaler, retailer, and broker from the competitive inroads of the chains.² During the twenties the chains, to achieve cost-efficiencies, had pioneered the "integration" of distribution—by combining within one corporate organizations the several functions previously performed separately by independent wholesalers, brokers, and retailers, thereby threatening to short-circuit them out of business. At the same time, the larger chains were in a position to bargain for lower prices from suppliers, and to pass along the efficiencies of their integrated distribution to the price conscious consumer of the 1930's.

¹ Rowe, Price Discrimination, Competition, And Confusion: Another Look At Robinson-Patman, 60 Yale L.J. 929 (1951). Also see, e.g., Rowe, Price Differentials And Product Differentiation: The Issues Under The Robinson-Patman Act, 66 Yale L.J. 1 (1956); How To Comply With Sections 2(c)-(f) Of The Robinson-Patman Act: A Study Of Current Enforcement Paradoxes, 1957 CCH Antitrust Law Symposium 124-41 (1957); The Evolution Of The Robinson-Patman Act: A Twenty Year Perspective, 57 Colum. L. Rev. 1059 (1957); Discriminatory Sales Of Commodities In Commerce: Jurisdictional Criteria Under The Robinson-Patman Act, 67 Yale L.J. 1155 (1958); Cost Justification Of Price Differentials Under The Robinson-Patman Act, 59 Colum. L. Rev. 584 (1959); Expectation Versus Accomplishment Under The Robinson-Patman Act, 1936-1960: A Statement of the Issues, 17 A.B.A. Antitrust Section 298 (1960); Antitrust and New Controls for Competitive Pricing, 1962 N.Y. State Bar Ass'n Antitrust Law Symposium 64 (1962); The Robinson-Patman Act: Elements Of A Price Discrimination Violation, 1963 Ill. B.J. 538; The Federal Trade Commission's Administration of the Anti-Price Discrimination Law—A Paradox of Antitrust Policy, 64 Colum. L. Rev. 415 (1964); Current Developments in Robinson-Patman Law, Remarks before Fourth Annual Corporate Counsel Institute, Northwestern Univ. (Oct. 14, 1965); The Robinson-Patman Act—Thirty Years Thereafter, 30 ABA Antitrust Section 9 (1966); Section 2(a) of the Robinson-Patman Act: New Dimensions In The Competitive Injury Concept, 37 ABA Antitrust L.J. 14 (1967); Competitive Injury Symposium, Panel Discussion, 37 ABA Antitrust L.J. 32 (1967); Significant Developments in Price Discrimination Under The Robinson-Patman Act, Panel Discussion, 37 ABA Antitrust L.J. 684 (1968); Some Special Problems Under The Robinson-Patman Act, Panel Discussion, 30 ABA Antitrust Section 41 (1966).

² E.g., Palamountain, The Politics of Distribution 58-89, 107-58 (1955); Zorn & Feldman, Business Under the New Price Laws 3-53 (1937); Edwards, The Struggle for Control of Distribution, 1 J. Marketing 212 (1937); Fulda, Food Distribution in the United States, The Struggle Between Independents and Chains, 99 U. Pa. L. Rev. 1051, 1082-1109 (1951).

As aptly summarized by Dr. Arthur Burns, the new Chairman of the Federal Reserve Board, and one of the nation's top economic scholars, the Robinson-Patman Act of 1936 reflected "the struggle between the older and newer organizations in distribution in which the older group sought protection from the state presumably because it was not prepared to rely on the outcome of competition."³

In this aim, the Act was the immediate successor to state anti-chain store laws, and the depression-born NRA Codes of Fair Competition, which imposed a variety of restrictions on discounts and rebates, and were held unconstitutional by the Supreme Court's famous Schechter decision in 1935.⁴

The emotional atmosphere of the Robinson-Patman controversy, which still lingers today, was dramatized by the legislative debates of three decades ago.

The opposing themes were vocalized then by two respected elder statesmen in the Congress today—the Hon. Wright Patman, for many years Chairman of the Committee on Small Business, and the Hon. Emanuel Celler, long Chairman of the Committee on the Judiciary and its Antitrust Subcommittee.

According to Mr. Patman's keynote remarks in 1935,

"The day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. So we have reached the crossroads; we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist...⁵

Mr. Celler maintained that "the mere mention of chains to some is like waving a red flag to a bull. They fail to realize that by striking at chains, as in this bill, they involve serious complications in other directions."⁶ In Mr. Celler's view, filed as the minority report of the House Judiciary Committee, "the consumer is made the goat." As he explained,

"The advocates of this bill include many independents unable to meet competition which is easily met by their efficient fellow dealers, and as well wholesale grocers catering to such small dealers handling the basic necessity, food, and asking for unnatural restraints upon their most efficient competition. They searched high and low when they had the N.R.A. for ways and means to the same selfish end. They want no restraints on themselves; they want them only applied to the other fellow."

". . . Unfortunately, housewives and the consumer generally are not organized. Their voice is not articulate. But retail grocers and the retail druggists, and the wholesalers catering to them, have banded together and have raised a lot of commotion and issued forth reams and reams of propaganda in support of this bill, but no thought have they given to the consumer. Indeed the consumer should be the main object of our care."⁷

Mr. Celler concluded:

"I am earnestly opposed to legislation such as that proposed in this bill, which is obviously inimical to the consumer, and intended, under cover of devious but innocent appearing wording, to assure profitable business to a trade class regardless of the efficiency of service rendered the consumer."⁸

Since 1936, and over the next three decades, the Act and these conflicting themes have been the target of innumerable critiques, debates, monographs, monologues and dialogues before legal and legislative forums. A classic 700-page study of the Act was published by Prof. Corwin D. Edwards, formerly Chief Economist of the FTC.⁹ Most of these studies have been critical of the Act or

³ Bruns, *The Effectiveness of the Federal Antitrust Laws: A symposium*, 39 Am. Econ. Rev. 689, 695 (1949).

⁴ *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), invalidated the National Industrial Recovery Act as an unconstitutional delegation of legislative powers.

⁵ Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. at 5-6 (1935).

⁶ H.R. Rep. No. 2287, 74th Cong., 2d Sess., pt. 2, p. 6 (1936).

⁷ *Ibid.*

⁸ *Ibid.*

⁹ Edwards, *The Price Discrimination Law* (1959).

its administration by the Federal Trade Commission, or both.¹⁰ The Justice Department Antitrust Division's chronic allergy to the Act has been notorious. Although the Antitrust Division shares concurrent jurisdiction with the FTC over the civil enforcement of the Robinson-Patman Act, it has brought about a dozen cases (mostly criminal) in 35 years—compared with over 1400 Robinson-Patman cases by the FTC. Indeed, the Justice Department in key Robinson-Patman cases has publicly disowned the FTC's positions before the Supreme Court.¹¹

This Committee is, of course, familiar with the recent reports of two Presidential commissions: President Johnson's Neal Task Force on Antitrust Policy and President Nixon's Stigler Task Force on Productivity and Competition, both comprising scholars of eminence and independence. Significantly, while diametrically opposed in outlook and recommendations as to key trade regulation issues of the day, such as our national policy toward industrial concentration and toward conglomerate mergers, both of these Presidential task forces made highly critical assessments of the Robinson-Patman Act and its administration, and proposed far-reaching legislative modifications.¹²

More significant from the public policy standpoint than the Neal and Stigler Task Force Reports, which have no official Presidential status, were the recommendations of President Johnson's Council of Economic Advisors, transmitted by the Economic Report of the President to the Congress on January 16, 1969. The Council's report contained a brief, but pointed analysis of **LEGAL RESTRICTIONS ON COMPETITION**, as follows:

"In spite of the Government's commitment to the strengthening of competitive markets, some existing laws may weaken competition. Most of these laws were adopted during the 1930's to relieve the especially serious impact of the depression on small firms in the distributive trades. (p. 108)

"Robinson-Patman Act"

"* * * The principal objective of resale price maintenance is to protect smaller concerns from their larger competitors. The prohibition of predatory practices is a valid objective of public policy. In practice, however, lower prices

¹⁰ E.g., Neale, *The Antitrust Laws of the U.S.A.* 464 (1960) ("No statute better demonstrates the legislative folly of trying to define 'sin' in detail"); Stedman, *Twenty-Four Years of the Robinson-Patman Act*, 1960 *Wis. L. Rev.* 197, 218 (1960) ("hodge-podge of confusion and inconsistency that any competent, order-loving lawyer must find offensive"); Keynes and Turner, *Antitrust Policy. An Economic and Legal Analysis* 239 (1959) ("unhappiest experience with semi-specific standards"; "insoluble interpretive problems"); Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 119 (1954) ("one of the most tortuous legislative pronouncements ever to go on the statute books"); Levi, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 A.B.A. *Antitrust Section Rep.* 60, 68 (1952) ("its concepts and theories are incomplete and contradictory, and the Act as a whole has no inner logic to remedy these defects"); Massel, *Competition and Monopoly* 55 (1962) ("a species of class legislation which, at best, has not affected competition and merely prevents reductions in the costs of distribution").

In addition, see, e.g., Adelman, *The Consistency of the Robinson-Patman Act*, 6 *Stan. L. Rev.* 3 (1953); Adelman, *Integration and Antitrust Policy*, 63 *Harv. L. Rev.* 27, 60 (1949); Austin, *The Robinson-Patman Act—Is It in the Public Interest?*, 1 A.B.A., *Antitrust Section Rep.* 92 (1952); Burns, *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 *Am. Econ. Rev.* 689, 695 (1949); Heflebower, *Monopoly and Competition in Various Countries, in Monopoly and Competition and Their Regulation* 134-135 (Chamberg ed. 1954); Levi, *Analysis of Chapter IV of Attorney General's Committee Report*, 7 A.B.A., *Antitrust Section Rep.* 85, 98 (1955); Handler, *Recent Antitrust Developments*, 71 *Yale L.J.* 75, 98 (1961); Mason, *The Current Status of the Monopoly Problem in the United States*, 62 *Harv. L. Rev.* 1265 (1949); Neale, *The Antitrust Laws of the U.S.A.* 474 (1960); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 *Mich. L. Rev.* 1139, 1198 (1952); Rahl, *Antitrust Policy in Distribution*, 104 *U. of Pa. L. Rev.* 185 (1955); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 *Ill. L. Rev.* 745, 749 (1949).

¹¹ See Memorandum for the United States as amicus curiae, p. 4, *Monroe Auto Equipment Co. v. FTC*, Dkt. 565 (Sup. Ct. 1965) (Solicitor General believes that "the Commission's decision suggests an interpretation of the Robinson-Patman Act that could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical integration of concerns engaged in the wholesale and retail distribution of merchandise") ; Petition for Certiorari, p. 16, *FTC v. American Oil Co.*, Dkt. 1014 (Sup. Ct. 1964) (Solicitor General "does not agree with the Commission" concerning competitive injury said to result from supplier's price assistance to small dealers caught in temporary local price war) ; Petition for Certiorari, p. 12, n. 7, *FTC v. Henry Broch & Co.*, Dkt. 61 (Sup. Ct. 1959) ("in appearing herein as legal representative of the Commission, the Department of Justice intimates no views of its own as to the underlying policy considerations that may be involved").

¹² For the Neal Task Force's pertinent recommendations, see this Committee's printed hearings, at pp. 303-305, 317-323. The Stigler Task Force's pertinent recommendations are reprinted at pp. 272, 275, 282.

reflecting greater efficiency and lower costs cannot be called predatory. Moreover, there is no evidence that the efficient small retailer needs such special protection, which can freeze an inefficient market structure.

"For these reasons, the Administration has consistently opposed legislation designed to extend resale price maintenance. Indeed, it is hard to see a continuing justification for the existing laws in today's prosperous economy."

"Robinson-Patman Act"

The Robinson-Patman Act is another important Federal law intended to protect the small from the large. The Act attempts to prevent chains, mail-order houses, and other huge buyers from extorting preferential price concessions from suppliers.

"Although public policy should be concerned with preventing improper use of the advantages conferred by sheer size, some evidence indicates that the Act has had the unintended effect of accentuating price rigidities in some markets. A seller may refuse to bargain on price with an individual customer by contending that under the law any concession granted to one buyer would have to be made uniformly available to all others. The law may conflict with the development of more efficient methods of distribution, such as integrating wholesale and retail functions or dispensing with independent brokers. By requiring proportionately equal treatment in certain promotional practices, the Act has discouraged experimentation with marketing techniques. It has been interpreted to prevent sellers from charging different prices in widely separated geographic markets."

"A careful reappraisal of the Act might suggest ways to focus its application more sharply on those particular forms of price discrimination that constitute a truly serious threat to competition." (pp. 108-109)

My own personal views, which I have expressed over the past twenty years, have also been critical of the Act and its administration. On the basis of a study published by Little, Brown & Co. in 1962, I came to the following here pertinent conclusions:

(1) Contrary to the 1936 Congressional objective to curb the "big buyer," the FTC's annals show that, despite more than 1400 formal Robinson-Patman proceedings since 1936, only a minute fraction concern abusive practices by big buyers banned by Section 2(f) of the Act.¹³ On the contrary, Section 2(f) was heavily brought to bear on small merchants, such as automotive parts distributors.¹⁴ Indeed, the overwhelming mass of Robinson-Patman enforcement proceedings since 1936 was aimed at smaller business firms.¹⁵ (This trend appears also in Appendix E, pp. 209-217, of this Committee's own printed hearings, showing the typical recipient of a Robinson-Patman order since 1962 to be an inconspicuous enterprise unfamiliar to the reader of *Fortune Magazine*.)

It is difficult to say whether these data indicate that larger firms are complying better with the Act than smaller firms, or whether the big firms have learned better to plan around its restrictions. Maybe it means only that cases against smaller firms are easier to win, and can rack up impressive litigation statistics. Interestingly, four important Robinson-Patman cases, against large national oil companies, were voluntarily dismissed by the Commission in 1964 and 1965.¹⁶

(2) Key FTC interpretations of the Act, not compelled by its text, can specially prejudice the growth of smaller firms. Thus, the FTC's "price by use" doctrine, applied in numerous pricing cases, holds that whenever a wholesaler or jobber grows beyond the single-stage operation of reselling to retailers, and combines wholesaling and retailing facilities and functions, he must pay the same price as other "retailers" who have not invested in comparable wholesale or jobber

¹³ The pertinent statistics appear in Rowe, *Price Discrimination Under the Robinson-Patman Act* 536-537 (1962); 1964 Supp. at 168-169. For later years, see note 24 *infra*.

¹⁴ See, e.g., *Mid-South Distributors v. FTC*, 287 F. 2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838 (1961); *American Motor Specialties Co. v. FTC*, 278 F. 2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884 (1960).

¹⁵ See Rowe, *Price Discrimination Under the Robinson-Patman Act*, 538-542 (1962).

¹⁶ Commission Order, Dec. 28, 1964, 1963-1965 CCH Trade Reg. Rep. par. 17.175, dismissed complaints in *Pure Oil Co.*, docket 6640; *The Texas Co.*, docket 6898; *Shell Oil Co.*, docket 8537. By order of March 25, 1965, the complaint in *Sun Oil Co.*, docket 6641, was also dismissed. Instead, the Commission directed an industry study and subsequently published a Report on Gasoline Marketing on June 30, 1967. I am not aware, of course, of pending Robinson-Patman proceedings involving *United Fruit Co.* (docket 8795), *Borden, Inc.* (File No. 681 0031), and several other large concerns, listed in Appendix H at p. 220 of this Committee's printed hearings, which remain to be adjudicated, as well as the FTC's successful actions against some national firms. E.g., *National Dairy Products Corp. v. FTC*, 412 F. 2d 605 (7th Cir. 1969); *Foremost Dairies, Inc. v. FTC*, 348 F. 2d 674 (5th Cir. 1965).

facilities and do not perform the same distributive functions.¹⁷ In effect, this discriminates *against* such distributors, by making them pay the same price even though they perform extra and valuable distributive functions. As criticized before the Supreme Court by the Department of Justice, which opposed the FTC's position, this "interpretation of the Robinson-Patman Act . . . could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical integration of concerns engaged in the wholesale and retail distribution of merchandise."¹⁸

Of similar impact have been numerous FTC applications of Section 2(c), the so-called Brokerage Clause. These have prevented smaller firms organized in buying groups in order to match the purchasing efficiencies of chains, from securing lower prices through the elimination of needless broker's fees. For example, the Court of Appeals in the *Central Retailer-Owned Grocers* case agreed with the Commission's Chairman that:

[C]ombination in one form or another by small firms may be essential to their survival, particularly in those industries characterized by massive aggregates of corporate power. The growth of the giant food chains, for example, revolutionized the behavior of the small independent grocery stores. They were quickly faced with the alternative of constructing cooperative buying arrangements or extermination. Certainly many independent food stores long ago would have withered before the competitive threat of large chains had they not formed retailer-owned cooperative wholesalers; stores with combined retail sales of over \$7 billion are now affiliated with such jointly-owned wholesalers.¹⁹

But, said the court, "In the case at bar the Commission would drive such groups out of existence."²⁰ Acknowledging that the retailer-owned buying group was able to secure lower prices from its suppliers through purchasing economies, the Court was not willing to

"Declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chain stores."²¹

(3) Above all, strikingly absent in the Federal Trade Commission's 30-year stewardship of the Robinson-Patman Act was the charting of priorities, policy, or planning directions. Upon expert assessment of economic and marketing factors, the Commission *could* have oriented the Act's reach toward some concrete policy goals—the legislative aim to curb discriminatory exactions by big buyers, or some other acceptable public objective. Instead the Commission seemed preoccupied with litigation statistics, unrelated to any overall plan or enforcement goal.²²

In short, the Federal Trade Commission, after more than a quarter of a century of Robinson-Patman enforcement, had not faced up to these fundamental questions of public administration: What is the purpose, individually and collectively, of Robinson-Patman proceedings in particular fields? What have over a thousand Robinson-Patman cases accomplished? In light of the lessons of the past, where should we go from here?

Accordingly, I stated five years ago that—"The policy dilemmas of the Robinson-Patman Act and the paradoxes of its administration cry for fundamental reassessment in a Great Debate. Although Congress to date has shown scant inclination for Robinson-Patman reform, Congress could provide the prime setting

¹⁷ See, e.g., *General Auto Supplies, Inc. v. FTC*, 346 F. 2d 311 (7th Cir. 1965); *Automotive Jobbers, Inc.*, 60 F.T.C. 19, 35 (1962); *Advisory Opinion Digest No. 263* (July 9, 1968); compare *FTC News Release*, Dec. 16, 1969, re *Advisory Opinion Relative to Common Ownership of Auto Parts Wholesaler and Parts Retailer*.

¹⁸ Memorandum for the United States as amicus curiae, p. 4, *Monroe Auto Equipment Co. v. FTC*, docket 565 (Sup. Ct. 1965); see also *Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy* 135 (1954) ("essentially anticompetitive"); *Neale, The Antitrust Laws of the U.S.A.* 244 (1960) ("economically perverse"); Note, 67 Harv. L. Rev. 294, 313 (1953) ("restricts the integrated retailer with such severity that this type of integration is not only discouraged but prevented").

¹⁹ 319 F. 2d 410, 415 (7th Cir. 1963).

²⁰ *Ibid.* See, e.g., *Biddle Purchasing Co. v. FTC*, 96 F. 2d 687 (2d Cir. 1938); *Oliver Bros., Inc. v. FTC*, 102 F. 2d 763 (4th Cir. 1939); *Independent Grocers Alliance Distrib. Co.*, 48 F.T.C. 894 (1952), aff'd 203 F. 2d 941 (7th Cir. 1953); *Topeco Associates, Inc.*, docket 6160 (Aug. 17, 1954).

²¹ 319 F. 2d at 415.

²² See *Rowe, Price Discrimination Under the Robinson-Patman Act*, 535-549 (1962).

for reappraisal of the Act near the seat of political power. The legislative forum, moreover, would muster the widest spectrum of relevant viewpoints—business firms and associations, consumers, scholars, and public officials concerned with the antitrust laws and the promotion of competition.

"Such a Great Debate should consider, among other things, (1) whether in an age of mass distribution and material abundance, it remains sound social or economic policy to protect traditional channels of distribution from competitive inroads; if so, (2) whether the Robinson-Patman Act, as administered, attains this or any other visible policy benefiting the American public; and, in any event, (3) whether and how the Act or its administration can be improved to ensure the attainment of currently acceptable policy goals."²³

Obviously, such a reappraisal today would specially consider the impact of the Act's enforcement on the consumer's interest in efficient distribution and lower prices in a critically inflationary era, straining both the Nation's and the housewife's budget.

Although my own study dates back several years, I know of no supervening development warranting a change in my views.

Indeed, recent years have seen a deepening crisis in Robinson-Patman administration by the Federal Trade Commission, to which the legal profession and the business community must look for guidance. This administrative impasse was signified by a dramatic slowdown of formal Robinson-Patman complaint proceedings under the Robinson-Patman Act since 1964,²⁴ coupled with a growing inability of the Commission to reach any consensus as to enforcement objectives or the proper interpretation of the statute. Important Robinson-Patman case have produced four separate opinions by the five Commissioners in reaching a decision, with dissents, concurrences, and partial dissents or concurrences, leaving the law in uncertainty and the bar in confusion.²⁵ The Commission's most recent key Robinson-Patman pronouncement, issued December 1, 1969, contained four separate opinions and took twenty months from the date of argument for the Commissioners to gestate, in judging pricing practices dating back to 1962 and 1963.²⁶

In 1968, Mr. Justice Harlan of the U.S. Supreme Court pointedly protested in the famous *Fred Meyer* case, where the Court promulgated a new statutory interpretation as to the promotional obligations of suppliers, over thirty years after the Act's passage:

"No doubt, the broad purpose of the Act was to protect small sellers from the advantages their larger competitors can obtain through greater buying power. In implementing this purpose, however, the statute imposes a hodgepodge of confusing, inconsistent, and frequently misdirected restrictions. * * * This course of action here and in similarly opaque cases might at least encourage the Congress to give this notoriously amorphous statute the thorough overhauling that has long been due."²⁷

Justice Harlan noted with approval the admonition of Judge Henry Friendly, an eminent and respected jurist, that:

"The tiniest fraction of the time spent by lawyers, legal writers, administrators, and judges in an unsuccessful endeavor to elucidate the obscurities of this

²³ Rowe, The Federal Trade Commission's Administration of the Anti-Price Discrimination Law—A Paradox of Antitrust Policy, 64 Colum. L. Rev. 415, 437–438 (1964).

²⁴ Thus, 221 Robinson-Patman complaints for fiscal year 1963 dropped to 84 in fiscal 1964; in fiscal 1965 to 12; in fiscal 1966 to 65; in fiscal 1967 to 6; and in fiscal 1968 to 8. In fiscal 1969, 9 Robinson-Patman complaints were filed.

²⁵ See, e.g., Dean Milk Co., Dkt. 8032 (Oct. 22, 1965) (Opinion of the Commission by Commissioner Dixon, Separate Statement by Commissioner MacIntyre, Dissenting Opinion by Commissioner Elman, Dissenting Opinion by Commissioner Jones); National Dairy Products Corp., Dkt. 7018 (July 28, 1966) (Commission Opinion by Commissioner Dixon, Dissenting Opinion by Commissioner Elman, Concurring Opinion by Commissioner Reilly, Commissioner MacIntyre and Commissioner Jones did not participate); National Dairy Products Corp., Dkt. 8548 (June 28, 1967) (Commission Opinion by Commissioner Dixon, Dissenting Statement by Commissioner Elman, Separate Statement by Commissioner MacIntyre, Statement by Commissioner Jones concurring in part and dissenting in part); see also Final Guides For Advertising Allowances And Other Merchandising Payments and Services, May 26, 1969, promulgated with Dissenting Statement by Commissioner Elman, Separate Statement by Commissioner MacIntyre and Concurring Statement by Commissioner Nicholson.

²⁶ Beatrice Foods Co., Dkt. 8663 (Dec. 1, 1969) (Commission Opinion by Commissioner Jones, Separate Opinion by Commissioner Dixon dissenting in part and concurring in part, Separate Opinion by Commissioner MacIntyre dissenting in part and concurring in part, Dissenting Opinion by Commissioner Elman).

²⁷ FTC v. Fred Meyer, Inc., 390 U.S. 341, 359–360, 362 (1968).

statute would have sufficed to put the house in order once the problems were revealed; but that time has not been spent."²⁸

For those reasons, I support the recommendations of the American Bar Association Commission to Study the Federal Trade Commission pertaining to the Robinson-Patman Act. In my view, the ABA Commission correctly proposed, in line with the 1969 recommendations of the President's Council of Economic Advisors, a study and appraisal of the Robinson-Patman Act, in light of its compatibility with antitrust objectives, with due regard for the consumer interest in distributive efficiency and lower prices in an era where inflation is a top civic concern.²⁹

On the basis of such an in-depth study and report, for which the FTC is ideally suited in terms of its Congressional reporting mandate,³⁰ accessible information, and economic expertise, specific legislative reforms could be considered and evaluated by the Congress.

I believe the Commission and its economic staff should have made such a report to the Congress long ago.

With such a factual and objective FTC study and report, explored and considered in public hearings, the Congress might provide the Commission with an updated and current mandate harmonizing the 1936 Act with *today's* needs—in terms of today's national priorities, including some cost-benefit estimate of over 1400 Robinson-Patman proceedings measured against identifiable aims and results. I would offer my personal assistance for such a task, and am convinced that the antitrust bar would likewise offer its resources and cooperation.

In conclusion, I welcome this Committee's inquiry, thank you for your courtesy, and trust that this Committee's work may foster a broader understanding of the problems surrounding the Robinson-Patman Act, as well as a measure of sympathy for those charged with statutory enforcement and compliance.

Mr. ROWE. Thank you, Mr. Chairman.

Mr. HUNGATE. Thank you, Mr. Rowe.

Mr. Horton.

Mr. HORTON. No questions. I just want to thank Mr. Rowe for his very succinct and excellent presentation today. I think it is very helpful.

Mr. ROWE. Thank you, sir.

Mr. HUNGATE. Counsel.

Mr. POTVIN. Mr. Rowe, you have done your usual outstanding job, succinctly and eloquently stating a point of view that is common, some of us would say, regrettably common within the antitrust bar.

I would like to ask one question, if I may. In closing your classic treatise on the subject you stated:

Since the consumer is no political match for the small business lobbyist and their legislative patrons, the balance of pressure naturally rests on the side of protectionism and restraint.

Mr. ROWE. What page are you reading from?

Mr. POTVIN. Page 554, sir.

Again, in your remarks today, one point in a slightly different context, you noted that you know of no intervening development warranting a change in your views. Would it not be fair to say that here we are in an area that has changed radically and drastically within the last several years; that is to say, that the forces of consumerism are quite apparently a match for many forces, in fact I think most political observers would say that it is the outstanding political force at work today within the Congress.

²⁸ 390 U.S. at 362, n. 6.

²⁹ Report of the ABA Commission to Study the Federal Trade Commission, pp. 67-68 (Sept. 15, 1969). Section 6(f) of the FTC Act empowers the Federal Trade Commission "to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation." 15 U.S.C. § 46(f).

³⁰ See 15 U.S.C. § 46(f). Actually, some of the Federal Trade Commission's most significant contributions to public policy have come about through FTC economic studies and reports.

Mr. ROWE. There are a number of questions in your question, Mr. Potvin, which I would like to address myself to seriatim, if I may.

I certainly agree that the consumer movement, which has been termed the consumer revolution by some, is one of the outstanding contemporary political developments affecting public policy in this area. It is for that reason that I would agree that the Robinson-Patman Act, as other legislative measures of another era, should be measured today in terms of its compatibility with contemporary needs and priorities. I think the problem of priorities is paramount in public administration. We cannot solve all of the problems of the entire world with finite and limited resources, and judgment must be made as to what is more important, what is of pressing concern and what is of lesser concern. And that is a matter both for the Congress and the administrators to judge in the light of their best judgment and best available assistance.

Now, with respect to the quotation from my volume, I would like to point out that the footnote reference to that statement was to a statement by the Honorable Emanuel Celler, chairman of the House Judiciary Committee, who made the very point which you stated, and who said:

"Unfortunately, housewives and the consumer generally are not organized, their voice is not articulate," et cetera, et cetera. And, of course, everyone knows that the most eloquent and articulate legislative opponent of the Robinson-Patman Act over a period of 35 years has been Mr. Celler, the eminent and distinguished chairman of the Antitrust Subcommittee and of the House Judiciary Committee. I think this is highly significant in terms of the legislative intent and the legislative climate.

The same footnote pointed out that Mr. Celler stated—and this is not in 1936 any more, he hadn't changed his mind by 1956—after a bill curtailing the meeting-competition proviso had passed the House over his very severe opposition:

Who am I to pit my views against the very rich talent of the proponents represented by the score of retail organizations who are directly affected by the bill?

And so I did document my statement with a reference in the congressional annals themselves.

One more point. You mentioned that my views might be regrettably common in the antitrust bar. From one standpoint that, of course, is the fact. They are common in the antitrust bar. But they are also common in the economic and scholarly minds of the country as well. If it were only the antitrust bar you might have one view. But I have listed in footnote 10 of my presentation today a series of scholarly writings by independent scholars who reached the same view.

And, of course, this committee has had before it as witnesses several independent economists who have made the same point. So I don't believe it is only the antitrust bars which hold these views.

Mr. POTVIN. No such inference of restriction was intended. At any rate, bearing in mind that your volume was published in 1959, Mr. Rowe—

Mr. ROWE. 1962.

Mr. POTVIN. You are quite correct, it was 1962—and eminently correct for that time and place, the consumer revolution has since intervened, and to that extent I think you have made the point.

Now, let me ask this. Yesterday Mr. Cornelius Kennedy testified. He gave his personal views, but he was here as a member of the administration law section of the ABA. He was accompanied by Mr. Robert Wald, who also testified. Mr. Kennedy made the point that administrative agencies are tripartite in nature, the executive and legislative and judicial functions being intertwined. He stated as part of colloquy that in the instance of the per se statutes at the time of the issuance of the mandate from the Congress to the agency that the legislative function was exhausted; that is to say that no legislative authority remained with the agency. Would you care to comment on that view?

Mr. ROWE. I don't know whether I understand the implication of the statement. If it is intended to suggest that at that point the agency becomes a robot and an automaton, I would disagree with it. If it is intended to state that at that point the legislative will has been spent and the agency must contribute its expertise and administrative abilities and judgment to the implementation of the legislative edicts, I would agree with it.

Mr. POTVIN. Were Mr. Kennedy here to place it in the context he meant, I am confident that he would hasten to add that he did not mean in any way to imply that there isn't the question of priorities in commitment of limited resources.

In your view, sir, what are prerogatives of a member of the Commission faced with a per se statute in the following circumstance. A citizen comes in with a perfectly blatant violation of a per se statute, perfectly documented, so that there is just no question about it, and he states, I demand that you enforce this law, the Congress has told you to do it, it is your job, how about it? How much discretion, and what are the prerogatives, the proper prerogatives of the Commission?

Mr. ROWE. That obviously is a complex inquiry. But let me point out that the most per se statutes that I know are the speed limits on our public highways. I should think if I were a police captain in a police station and someone came in and said, 10 miles down somebody is going 30 miles per hour instead of 25, and somebody else came in the other door and said, someone is being murdered down the block, I think it would be within the discretion of the police officer to exercise his good judgment and to pursue as a matter of priorities what is important and to defer as a matter of priorities what is less important. And I believe a Federal Trade Commission or any other public official should have at least that much discretion in terms of ordering priorities and in terms of judgment.

Mr. POTVIN. So he does have the right in your view to arrange priorities.

What about actively opposing the enforcement of a per se statute? In other words, the very mandate he has been given the job of enforcing he opposes. What comment would you have on that?

Mr. ROWE. I wish you could be more specific, because I don't know what we are speaking of. And I hesitate to pontificate on any broad scale about something which is obviously very delicate.

Mr. POTVIN. Speaking now of the Robinson-Patman Act, obviously referring to sections (c), (d), and (e), the per se sections. What rights would a Commissioner have to actively espouse that these not be enforced?

Mr. ROWE. I don't know what you mean by actively espouse that these not be enforced. Also there is some room for leeway there with respect to whether some of these things are per se in the first place, and what falls under them, and what is their scope. For example, you would view section 2 (d) and (e) of the Robinson-Patman Act as a per se statute, and yet the Commission has issued a recent advisory opinion which exonerated a promotional plan with discriminatory content as not injurious to competition.¹ So I don't believe it is as cold turkey as some might put it.

Mr. POTVIN. Are you then in disagreement with Mr. Kirkpatrick that this would amount to administrative amendment of legislation, as was developed in colloquy during his appearance here.

Mr. ROWE. I am not familiar with that specific colloquy, but I would say that if he stated that administrative legislation is contrary to the constitutional scheme, I would agree with that concept. I think that there is no dispute as to concept. I think it is a matter of what are the particular facts and what is the particular occasion. I believe the concept is incontrovertible.

Mr. POTVIN. Thank you, sir.

Thank you, Mr. Hungate.

Mr. HUNGATE. On page 7 of your statement, Mr. Rowe, I think you are quoting:

The law may conflict with the development of more efficient methods of distribution, such as integrating wholesale and retail functions or dispensing with independent brokers.

Wouldn't you think there has been nonetheless a considerable integration of wholesale and retail functions?

Page 7. Do you have it?

Mr. ROWE. Yes, I do.

That quotation, Mr. Chairman, is from President Johnson's Council of Economic Advisers who, in their 1969 report to the President as transmitted to the Congress, made those observations.

Mr. HUNGATE. What I am thinking would be such things as the feed lot chains, where maybe the chainstores would open feed lots, feed their own cattle and have this sort of an integration, where certain feed companies would get really into the poultry businesses, turkeys, and fowl and that sort of thing. Wouldn't that represent a form of integration that we have seen in the last few years?

Mr. ROWE. Yes, it would.

Mr. HUNGATE. And I wonder, would you think there might be some intangible values—now, there is the value of the low price, which is one we can see—but in retaining certain small businesses through the protection of this act, I am thinking of comparable legislation—we just had the State Taxation of Interstate Commerce Act, which has been before Congress, to relieve certain interstate industry or mail-order houses of certain local taxes.

Do you think there should be some area of concern aside from price as to the communities which will make the contributions and pay the taxes and support the schools and hospitals and churches and civic organizations, the police and fire protection, water and sewer facilities in some of these areas? How will we recoup these funds if we don't in some way preserve the small businessman there.

¹ See Advisory Opinion Digest No. 384 (Oct. 29, 1969 and Dec. 16, 1969).

Mr. ROWE. Well, Mr. Chairman, I think vertical integration, as all other forms of integration, can pose problems of a significant sort. As you know, the Justice Department in its cases against conglomerate mergers has rested its antitrust theory in part on social considerations as, for example, the loss through large conglomerate acquisitions of local facilities and local accountants, maybe even local law firms, of a source of their accustomed functions and business and means of survival. So I think this is a very difficult social problem which cannot be ignored. And I certainly would not ignore it. But conversely, I would also stress that vertical integration is really a growth process, and a very important growth process which must be encouraged and preserved lest the initiative to grow which is the mainspring of our free enterprise system in our competitive economy be dulled and frustrated. And when, let us say, a gasoline retailer becomes a jobber, or a jobber adds a retail pump, I think that is a desirable form of expansion which gives this man an initiative to build his business and to do a bigger job, and to earn a greater profit, which is the essence of the process of growth.

Mr. HUNGATE. I was interested in your discussion of jobber. Would not perhaps there be a justification for a favorable price discrimination to the jobber in the volume that he does before he even puts in his retail pump?

Mr. ROWE. There should be, Mr. Chairman. On the other hand, even though in the statute there is the so-called cost defense, that defense has been very, very difficult to establish over the years, because there have been very restrictive interpretations of it by the Commission, to my mind not necessitated by the statute as written by the Congress, which have made that defense virtually impossible to establish for many people. So even though there may be this theoretical statutory right to justify the lower price by the cost justification, this has been a very, very difficult thing to do. For that reason this flexibility of prices, which is desirable from the standpoint of getting a lower price to that jobber, may not have been possible in that situation.

Mr. HUNGATE. Any questions?

Mr. WERTHEIMER. Mr. Rowe, we have had a lot of testimony dealing with "empirical data," statements that there is a marked lack of empirical data in this field, and that much of what has been said by people arguing on both sides of this issue in fact lacks the empirical data to back up their position. Do you think the kind of study the ABA report recommended could be helpful in dealing with this problem?

Mr. ROWE. Very definitely. I believe that there could not be any serious disagreement about the desirability of this. I do of course commend to you gentlemen the study made by Prof. Corman D. Edwards, a former Chief Economist of the FTC. But that is also a bit outdated. I think the FTC has the expertise, has the resources, has the information, and as I would view it, has the responsibility in a matter of this cardinal public importance to make the information

available to the Congress by way of an objective study. And it could lead to a solution of these problems based on a factual record, based on economic analysis which the Federal Trade Commission can muster, and perhaps take some of the emotionalism out of these issues.

As a matter of fact, I would hope that the Federal Trade Commission's chief economists could give their views on this matter to the committee, too, if that is compatible with the committee's plans.

Mr. WERTHEIMER. Thank you. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. Your colleague from the antitrust bar, Mr. Robert Wald, yesterday made the observation that in attempting to analyze either the impact or the rationale of the Robinson-Patman Act, that he felt one point that was too often overlooked was that there is more here than just economics. And he then went on to speak briefly concerning the social effects. Do you concede that, quite apart from the economics, that it is here almost uniquely difficult to measure the social side effects that is implicit in the entire debate.

Mr. ROWE. I have no doubt that there are very serious social implications. But I must insist that the statute is written in terms of effects on competition in the market. Now, social problems may have appropriate social solutions, but I don't believe they should overcome a legislative mandate which is expressed in terms of competitive effects on markets, which presupposes economic judgments and not social judgments.

Mr. POTVIN. I think Mr. Wald's point was, though, that the judgments of the Congress that led to the enactment of the statute were in large part, he felt, social rather than economic in nature, and that when you start trying to devise methods of measurement for that sort of thing, it is of course inordinately difficult; is it not?

Mr. ROWE. It is. To use a prevalent phrase, I would be a strict constructionist in that situation, because if administrators take the law, not as they find it as written in the statute, but start psychoanalyzing the Congress 30 years ago as to what might have been contemplated socially by some rather than others, I think you are down a rather slippery slope. I don't mean to minimize the social implications, but I believe to you must take the law as you find it.

Mr. POTVIN. And yet a few pages before you were deciding what the goals and objectives were. You are not saying now that those should be economic goals and objectives?

Mr. ROWE. I was striving, Mr. Potvin, for some articulation of priorities by the Commission in terms of what it, as the FTC, would like to accomplish in terms of what the statutory mandate was.

Mr. POTVIN. Thank you.

Mr. HUNGATE. Thank you very much for a very helpful statement. We appreciate your being with us.

Mr. ROWE. Thank you very much, Mr. Chairman, and Counsel I do appreciate your courtesy.

Mr. HUNGATE. The next witness is Ira Millstein.

We are very pleased to have you with us, Millstein. You may have a seat and proceed.

**TESTIMONY OF IRA M. MILLSTEIN, WEIL, GOTSHAL & MANGES,
SPECIAL COUNSEL, TOILETRY MERCHANDISERS ASSOCIATION,
INC., ACCOMPANIED BY ISADORE IMMERMAN, GENERAL COUN-
SEL FOR THE ASSOCIATION**

Mr. MILLSTEIN. My name is Ira Millstein. And in accordance with the tradition I would like to identify myself, Mr. Potvin.

I am a former chairman of the New York State Bar Association's antitrust law section. I am adjunct professor of law at NYU's School of Law, where I have taught a course on the Robinson-Patman Act since 1964. And I was a member of the American Bar Association's commission to study the Federal Trade Commission.

I have also written several articles in the field of Robinson-Patman.

Before I begin my formal statement, I would like to second the motion which Mr. Rowe made for a study of the Robinson-Patman Act by the Federal Trade Commission as suggested in the ABA report.

I would like to answer one other question that was put to Mr. Rowe. I am not quite sure that the study would be as empirical as we hoped it would be. I have talked to economists; I am not sure that you can conduct an empirical study, but I would like to try.

I also believe that injected into the study would have to be political and social considerations.

This law generated from political and social considerations, and I am quite certain that any changes that take place in it will have to take those political and social considerations into account.

With that modest difference between us I do urge Congress to recommend that such a study be made. It is time to take the heat out of this question and put some light on it. And along with Mr. Rowe I would be delighted to lend my services to any such study should they be requested.

Particularly I am here today—of course, I am prepared to respond to any questions you may have, but I am here particularly today on behalf of the Toiletry Merchandisers Association, a client. I find that the problem which I am about to describe to you is an interesting one, and one that should illuminate more than just the problem we are presenting.

It raises a whole series of questions which throw into the spotlight the issue of administrative discretion in interpreting the Robinson-Patman Act.

It is my personal view that many of the problems which have arisen under the statute might not have arisen had a less wooden and less restrictive interpretation been given to the statute.

I have stated before on many occasions that I think that the statute is a result-oriented statute. Very frequently you look at a problem, if you are an administrator, decide how you want it to come out under the Robinson-Patman Act and then reason your way toward it. That is why I think result orientation can also work in favor of business under the Robinson-Patman Act.

If the administrators of the statute, those who interpret it and enforce it, were to determine whether or not a particular result should be in favor of the respondent or the applicant, I think they can find ways of reasoning their way toward it. I don't think that the Robinson-Patman Act need be as restrictively construed as it has been up to now.

I think with a little administrative elbowroom and the exercise of ingenuity, some of the grosser restrictions imposed by the statue could be loosened, and loosened to the benefit of small business and to the benefit of the consumer.

Now, let me get specifically, then, to the problem.

The Toiletry Merchandisers Association is, of course, a trade association, and they greatly welcome the opportunity to present their views concerning the continued effectiveness of the Robinson-Patman Act.

Briefly, the Toiletry Merchandisers Association fully supports the basic purpose of the Robinson-Patman Act, which is to remove improper impediments which disable smaller enterprises from competing as effectively as possible with manufacturers or retailers of greater size and economic strength. To achieve this purpose the association believes that it is essential that outmoded concepts should not be applied to modern marketing techniques in a manner which hinders, rather than recognizes, the growth of modern and efficient marketing devices.

The Toiletry Merchandisers Association is a trade association consisting of 125 distributor members, most of whom are independent, small businessmen. Its members service more than 56,000 supermarkets and groceries nationwide with health and beauty aids.

Just interpolating, that is toothpaste and hair lotions and that sort of thing.

These retailers are generally the smaller elements of the grocery industry—the retailers sought to be protected by the Robinson-Patman Act—and the existence of toiletry merchandisers assists these smaller outlets to compete in the resale of health and beauty aids. Because they do not have the capacity to perform the merchandising services essential in purchasing, stocking, and displaying the hundreds of different toiletry products distributed by wholesalers and toiletry merchandisers, or to deal on a direct basis with the many additional nongrocery product manufacturers with whom they would have to do business if they desired to purchase such products directly from the manufacturers, many retailers must rely on the toiletry merchandiser on such products.

But for the existence of the toiletry merchandiser, many of these outlets would not carry any substantial amount of toiletry products, for the functions of toiletry merchandisers are quite unique in the retailing field. Once a retailer decides that he wants to be serviced by a toiletry merchandiser, he simply sets aside specific display space for the sale of health and beauty aids, which is then completely controlled and operated by the toiletry merchandiser. The toiletry merchandiser controls the selection of products to be sold in the store, including the space allocated to each product, and handles the physical placement of displays and fixtures. The toiletry merchandiser decides which items to promote, and determines the manner of promotion. The toiletry merchandiser even pays the cost of advertising and promotional services. He continuously services his shelves in the store to make certain that merchandise is properly displayed, and that out-of-stock conditions are avoided. The toiletry merchandiser warehouses the merchandise and also picks up for credit all obsolete, damaged, and unseasonable merchandise. Moreover, although the toiletry merchandiser sells the merchandise to the retailer, the sale is on a no risk, guaranteed profit basis.

Thus, the services performed by the toiletry merchandiser combine all of the normal wholesaling functions, and every retail function other than the ringing up of the final sale on the cash register. The toiletry merchandiser is a modern marketing unit not dreamed of in 1936 when the Robinson-Patman Act was enacted. His existence demonstrates how in the 33 years which have elapsed since the enactment of the Robinson-Patman Act, tremendous distributional changes have occurred throughout the economy—most certainly in the grocery and toiletry industries. "Groceries" now sell drugs, and vice versa. Wholesalers now retail, and retailers now wholesale. The development of hybrid distributors, many with increased marketing efficiencies, has obviously made it a difficult task for manufacturers to categorize customers as "wholesalers" or "retailers," in classical Robinson-Patman terms. But this should make no legal difference.

Because the language of the Robinson-Patman Act must now be applied to the complexities and overlaps of today's marketplace, it seems obvious that for the statute to remain a viable antitrust tool, statutory interpretations must be responsive to the economic changes which are occurring. If simple 1936 distributional categories, such as "wholesale" or "retail," stand in the way of the evolution of efficient distribution, a more imaginative approach must be adopted, especially where it assists smaller, independent business units in their efforts to compete with the more economically powerful elements. This was certainly the underlying premise of the Supreme Court in its *Fred Meyer* decision, and it should also be adopted by the Federal Trade Commission, if the Robinson-Patman Act is to keep pace with changing conditions in the marketplace.

But the Federal Trade Commission has from time to time taken a mechanical approach to the Robinson-Patman Act, interpreting the statute in a manner which appears to penalize innovation and efficiencies, and which appears to create competitive harm to small businessmen such as the average toiletry merchandiser and the retailers he serves. Thus, a few years ago the Commission declared that allowances for functional services beneficial in the distribution of merchandise could not be offered to a distributor, even if offered to his competitors, when some competitors are not equipped to perform such service—albeit because of their own inefficiency.

Such a refusal to permit incentives for marketing efficiencies has forced toiletry merchandisers to discontinue servicing many smaller accounts. For example, one member of the Toiletry Merchandisers Association in New England has reported that he recently discontinued servicing some 100 accounts who were simply too small to be profitably served in the face of the rising costs in warehousing, merchandising and display services which are necessary for such retailers to carry toiletry products. Certainly, the Robinson-Patman Act cannot be properly read to deny manufacturers the right to reimburse toiletry merchandisers for the costs of servicing such accounts, when to interpret the statute in this fashion eliminates smaller retailers as competitors to national or regional chains.

The Robinson-Patman Act should be construed to permit bona fide functional discounts or allowances to customers, offered and paid to all ready and willing to perform, in return for services which promote competition, encourage innovation, benefit the consuming public

or advance the basic goals of the antitrust laws. If a distributor is reluctant to innovate or to attempt to develop marketing efficiencies, why should those willing to move with the times be penalized? Inefficiency should not be rewarded. On the contrary, modern distribution techniques which promote competition, and which enable the smaller retailing units to compete more effectively, should be encouraged and rewarded so long as such rewards are made available to all of those similarly willing to operate on a more efficient basis. To view the statute otherwise, as the Federal Trade Commission has at times done in the past, is to permit economic discrimination, which is contrary to the purposes of the Robinson-Patman Act.

I am pleased to note, however, that in its most recent advisory opinion which considered the question of functional allowances, the Federal Trade Commission did not adopt an uncritical approach to the problem. Instead, it indicated that it was studying distributional allowances on an industry by industry basis in order to determine whether it will, under certain circumstances, consider such allowances to be permissible.

Thus, the Federal Trade Commission may now be willing to consider this issue of importance to the Toiletry Merchandisers Association, and to the small businessman its members service, on the basis of economic facts rather than legal compartmentalization. For this reason, the association urges this subcommittee to report that the purposes of the Robinson-Patman Act will be furthered if the Federal Trade Commission interpreted the statute as permitting manufacturers to offer bona fide distributional allowances to all who are willing to perform services that increase distributional efficiencies, and expand the number of outlets capable of carrying their products.

The Toiletry Merchandisers Association greatly appreciates the opportunity it has been afforded to submit these views.

And I hope they do illuminate some of the problems that do need clarification.

Mr. HUNGATE. Thank you. We are pleased to have you with us.

In your merchandising, in whom does title rest in the merchandise that is on the shelf?

Mr. MILLSTEIN. In the retailer.

Mr. HUNGATE. The title passes when you deliver it to him, is that it?

Mr. MILLSTEIN. Yes.

Mr. HUNGATE. And he is responsible and charged for it?

Mr. MILLSTEIN. Yes.

Mr. HUNGATE. Now, you mentioned that some of the allowances for functional services beneficial in the distribution of merchandise could not be offered to a distributor, even if offered to his competitors, when some competitors are not equipped to perform such services.

Mr. MILLSTEIN. Right.

Mr. HUNGATE. Even if it is their own fault because of inefficiencies and otherwise. What sort of service are we talking about?

Mr. MILLSTEIN. Let's take the difference between a toiletry merchandiser and a typical wholesaler of the same product, toothpaste. A wholesaler will take a big package of a variety of health and beauty aids and lay it on the front step of the store. The store people at that point must take it, unpack it, put it on the shelf, service the shelf, determine where they are going to have specials, put new merchandise on

the shelf, clean out the old merchandise, put up any display of promotional material that is sent around, and in general service those shelves. All that is done by the store. The wholesaler in that circumstance does nothing but take a package and leave it on the front doorstep of the store.

That is why many smaller grocery retailers just don't engage in the business of selling health and beauty aids, because those little items have small markups, it is highly competitive, and it may be too much trouble. So they just don't bother, thus eliminating themselves from the field of competition.

The toiletry merchandiser is a form of rack jobber, which is a newer type of distributional system. It has been in development for many years. The rack jobber, or toiletry merchandiser, comes to the store, and instead of laying down a package and leaving to the store the task of doing all the things I have just described, he actually goes into the store and services that rack, that shelf. He puts up the merchandise, he decides what should be carried, having a greater judgment as to what is moving in the community because he is totally aware of all these products. He decides to carry brand X instead of brand Y, he decides to carry four varieties of shampoo instead of two, he decides to carry certain patent medicine instead of others, and so on. But he, the toiletry merchandiser, makes that decision. And having made that decision, he goes into the store, arranges the display in an attractive way, puts up any other signs or devices that will help sell, screens out the old merchandise, and in effect runs the toiletry department for the grocery retailer.

Now, this group of toiletry merchandisers has simply opened up all sorts of retailers to this type of toiletry business who wouldn't have been in it.

MR. HUNGATE. Perhaps I have missed it. But what are the services that some of them are too inefficient to perform under these circumstances.

MR. MILLSTEIN. The wholesaler. The wholesaler won't perform those services.

Now, what happens is, the wholesaler simply says, I am going to drop a package on the front stoop of the store.

And the wholesaler says, we are not going to perform the services which I have just described, going into the store, servicing the shelf and so on, we are just not going to do it.

The manufacturer says, you are both wholesalers, you toiletry merchandisers, and you traditional wholesalers you are both wholesalers, and I must give you both the same price.

And the manufacturer says, I can't find a way to reward you, toiletry merchandiser, because as the law has presently been construed by the Federal Trade Commission, a wholesaler is a wholesaler is a wholesaler. And it doesn't make any difference how efficient that wholesaler is, or what additional services he performs. This is the price by use doctrine; because you resell to retailers you are a wholesaler, and the manufacturer may have only one price to wholesalers. He cannot distinguish between wholesalers.

MR. HUNGATE. Between box wholesalers and displaying wholesalers.
MR. HORTON. Do you just rent space when you go into a store?

Mr. MILLSTEIN. We do not rent space. The retailer designates the amount of space that he wants the merchandiser to service, and the toiletry merchandiser services it.

Mr. HORTON. Do you charge him for the products?

Mr. MILLSTEIN. We guarantee him a profit.

Mr. HORTON. Is that on a percentage basis?

Mr. MILLSTEIN. Yes; in general.

Mr. HORTON. How does that generally work?

Mr. MILLSTEIN. The retailer specifies what percentage return he wants on that space.

Let me introduce Mr. Isadore Imberman, who is the general counsel of the TMA, and much more familiar with its workings.

Generally the retailer requests that he wants x percent return on that space, and in effect therefore the retailer is telling the merchandiser the price at which he wants the merchandise sold.

Mr. HORTON. He hasn't bought the products?

Mr. MILLSTEIN. Oh, yes he has.

Mr. HORTON. All you are doing is paying him a percent—is it sort of like a concession in a ball park or something like that?

Mr. MILLSTEIN. When the merchandiser puts the merchandise in the store he pays the merchandiser for that merchandise.

Mr. Imberman points out that he pays the toiletry merchandiser the retail price less the percentage that he has asked the merchandiser to produce for him.

Mr. HORTON. Let's go over that again. He pays what?

Mr. MILLSTEIN. He pays the retail price less the percentage profit that he has requested and which the merchandiser has agreed to provide him.

Mr. HUNGATE. In other words, if he buys a thousand dollars worth of merchandise, and let's say, 40 percent was what his discount is, then he pays \$600 and puts in \$1,000 worth of merchandise, and off you go?

Mr. MILLSTEIN. Exactly. But the reason he has title is that he pays when the merchandise moves into the store, not when it is sold off the shelf.

Mr. POTVIN. Mr. Chairman.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. In the more conventional wholesaler transaction, I check my stock as a retailer, and I see that I am short on, let us say, Bufferin, and 12 other items, and I reorder them as my needs apparently dictate. Who makes that decision for a rack jobber operation?

Mr. MILLSTEIN. The rack jobber. The toiletry merchandiser makes the decision. That is part of the expertise that he is giving the retailer who is not otherwise in the toiletry business.

Mr. POTVIN. So that we have here in usual terms at least a kind of anomaly.

Mr. MILLSTEIN. Absolutely.

Mr. POTVIN. And while title passes, what it is that title passes to is your judgment and not my judgment?

Mr. MILLSTEIN. Exactly.

Mr. POTVIN. Which would be the converse.

Mr. MILLSTEIN. Exactly, Mr. Potvin. And that is the interesting industry that comes up under the Robinson-Patman Act and doesn't fit anywhere.

Mr. HORTON. Would counsel yield there?

Suppose I provided this space, and this is a matter of toothpaste, and you furnish a particular type of toothpaste. Let us assume that it is on the rack, but it doesn't sell. Now, it is time to change.

Mr. MILLSTEIN. We have a guaranteed return basis, the merchandiser takes it back and gives him full credit.

Mr. HORTON. What do you mean "full credit"?

Mr. MILLSTEIN. He doesn't pay us. We credit him with what he pays us.

Mr. HORTON. What about the title of the products?

Mr. IMMERMAN. It comes back to us.

Mr. HORTON. It is another transaction?

Mr. MILLSTEIN. That is correct.

Mr. IMMERMAN. For instance, when the winter comes and he doesn't need any of the cold weather products, we take all the cold weather products back, and we begin to put suntan lotion on the shelf. And we credit him with every dollar's worth of that winter merchandise against what he owes us, and we begin to bill him for the summer merchandise at the new price less his respective discount. And if he were to discontinue our services we have to take every bit of that merchandise back and refund to him all the money that he paid us for it while it was his property.

Mr. MILLSTEIN. Let me just point out that we have had a colloquy and exchange of letters with the Federal Trade Commission about another problem on behalf of the toiletry merchandisers. And they just told us in a letter that we are resellers to retailers. Now, you see, this is the position we find ourselves in, resellers to retailers, because when the merchandiser moves the merchandise into the store he is paid.

Mr. HUNGATE. This has got to lead to lawsuits sometimes when a fellow wants you to take it back and it is in damaged condition, or you think it is, and he doesn't. Do you ever have disputes of that kind?

Mr. IMMERMAN. We have never had a lawsuit in over 17 years of servicing these stores. That is our stock in trade; that is our label; that is what we are known for. And that is why we have grown. And that is why people do business with us, because we are anxious to prove to this man that—

Mr. HUNGATE. A guy never comes in and says, I have checked this space, and you have been running it for 6 months, and you have mis-handled it, and I have—should have made a lot of money on it?

Mr. MILLSTEIN. All he does at that point is fire the toiletry merchandiser and either take over the department—

Mr. HUNGATE. And there is no difficulty at all about the amount of money he gets?

Mr. MILLSTEIN. I think we can assure you, I do not know of one lawsuit in the 17 years of existence of this organization. It just doesn't happen.

Mr. HORTON. Why should you get a cheaper price than the wholesaler?

Mr. MILLSTEIN. Because we are performing many times the service he does.

Mr. HORTON. The fellow that is a retailer would have to buy it from the wholesaler, and he would certainly have to pay more just for the box coming on the job.

Mr. MILLSTEIN. I agree with that, because the wholesaler is doing nothing.

Mr. HORTON. There are two steps, though, and you are trying to perform both of the steps. There is one step, it goes from the manufacturer to the wholesaler, right?

Mr. MILLSTEIN. A sale by a manufacturer to a wholesaler; yes.

Mr. HORTON. It goes from the manufacturer to the wholesaler?

Mr. MILLSTEIN. Correct.

Mr. HORTON. And then from the wholesaler it goes to the merchant?

Mr. MILLSTEIN. Yes.

Mr. HORTON. In the example you gave, which is a good one, the formal procedure is to put this in a box and put it on the front steps?

Mr. MILLSTEIN. Right.

Mr. HORTON. And that is the second step?

Mr. MILLSTEIN. Right.

Mr. HORTON. And really there is a third step, and that is to merchandise it and sell it.

Mr. MILLSTEIN. Which is the retailer's job?

Mr. HORTON. That is the usual procedure?

Mr. MILLSTEIN. Right.

Mr. HORTON. And what you are trying to do, you want to be in the position of the wholesaler, and also in the position of the retailer.

Mr. MILLSTEIN. We are in the position of a wholesaler, but performing some of the functions that the retailer used to perform for himself, as well as other merchandising functions.

Mr. HORTON. Why should the manufacturer have to give you—

Mr. MILLSTEIN. He doesn't have to do anything, but he likes our service very much, because we have opened up stores and lines of distribution that would not carry his products; they couldn't afford to do business with the wholesaler. The whole point is that these smaller stores will not do business with wholesalers of new lines of nongrocery products, because they have not got the personnel or the time or the money to deal with such wholesalers and dress these racks. So they just do not go into the business. Most of the business that these toiletry merchandisers developed in the original days was from stores which weren't selling health and beauty aids.

Mr. HORTON. And your point is that the Robinson-Patman Act ought to be updated in order to accommodate this new marketing approach?

Mr. MILLSTEIN. I don't think you need—as I was explaining to Mr. Potvin, I don't think you need a revision of the statute; I think you can do it under the statute as it exists right now.

Mr. HORTON. In other words, it could be done administratively.

Mr. MILLSTEIN. It could be done administratively with a constructive interpretation of the statute. There is really not very much difficulty to it at all.

I have written an article on "Availability" which appeared in the New York University Law Review, which you could apply to this and say in a very fair way, any manufacturer which wanted these services—after all, the manufacturers benefit from it, because it in-

creases the distribution of their products—any manufacturer who wanted these services could offer the additional discount to anyone who was willing to perform them. So that those who were willing to do the job of engaging in this type of distribution could be paid for it. We are not asking for any exclusive treatment; we are saying, make it available to anyone.

Mr. POTVIN. Mr. Millstein, this same chain of thought perhaps leads to the conclusion that a stocking as opposed to a nonstocking wholesaler should receive additional compensation.

Mr. MILLSTEIN. Exactly. I have no trouble with that either, Mr. Potvin. These are the types of rulings where the Commission has held that a stocking jobber cannot get an additional discount over and above what the nonstocking jobber gets.

And with this I disagree. Because I feel that if the manufacturer says to every jobber, I will pay you x percent additional if you will stock for me, then it is up to the jobber to move. If he wants the additional discount, let him stock. If he doesn't stock, then he has made the decision not to get the discount.

Mr. HORTON. What you have said is that so far they have not been able, because of the interpretation of the Robinson-Patman Act, to provide a percentage incentive for this type of service.

Mr. MILLSTEIN. That is correct.

Now, there have been several interesting examples of this problem. SKF attempted to develop a promotional plan whereby they said to wholesalers, if you do this level of service, we will give you 2 percent additional. If you do the following additional things you get an additional 2 percent. If you do the following further additional things you get an additional 2 percent. They had a series of additional merchandising activities that the wholesaler could engage in, and if he performed one or more of them he got a little extra discount.

The Commission informally disapproved, taking the position that it is the wholesaler's business how he does business, and that manufacturers could not pay, in this manner, for additional services rendered. I submit to you that this simply puts a blanket on the distributional system and does not encourage anybody to try anything new.

Mr. HORTON. And also what you are saying is that with regard to this distribution you are in a unique category because these are products that the manufacturer normally has difficulty putting in these markets and getting people to take. I imagine there are other unique situations too.

Mr. MILLSTEIN. No, they are not that unique. There are many types of merchandise and many types of distributors who are in the same position.

Mr. HORTON. I wasn't using the word "unique" in that sense. I was using it in the sense that it was not normal under the practices that they had under the Robinson-Patman Act when it was first originated.

Mr. MILLSTEIN. Exactly, Mr. Horton. In the old days—I shouldn't say old days, in 1936—you had a retailer and wholesaler and a manufacturer, and the retailer bought from the wholesaler, who bought from the manufacturer. It was very easy to look at the distributional system and know where everybody belonged, you were this and he was that and the other fellow was the other thing, and you could tell what category to put everybody in. But since 1936, in order to get goods out

into more retail units, things have just gone wild, and all sorts of new distributional techniques have arisen which nobody ever dreamed of.

And this group is one.

Mr. HORTON. In the other definition of the word "unique," you are saying that this system is not unique in distribution of products today, that it is fairly common is that what you are saying?

Mr. MILLSTEIN. Yes. There are rack jobbers, for example, who are distributing other types of products. There are rack jobbers who distribute paperback books, example. There are rack jobbers who distribute into grocery stores items of apparel like stockings, and so on.

In other words, the whole rack jobber idea of taking the merchandise and putting it in the store instead of dropping it on the door step of the store, is a new, evolving concept. Now, the reason for it is clear, big stores and little stores have tremendous trouble getting help, that is obtaining knowledgeable help from someone who knows how to dress racks and what to buy, and so on. Anyone who operates a small grocery store might well appreciate having someone tell him what to buy of nongrocery products, what kind of toothpaste, and what kind of this and what kind of that. This is why the smaller elements in the industry, and even some of the bigger ones, turn to somebody like a rack jobber, a specialty rack jobber and say, put in my store that which will sell. Say, for example, paperback books. It is the same question, what moves fast, what should you carry.

Mr. HORTON. With regard to profit, I assume that there is a profit at the present time even though the situation is as it is now.

Mr. MILLSTEIN. There is, Mr. Horton, a profit. But what has happened—and this is what I described in my testimony—is that some of the rack jobbers are dropping the smaller accounts, because they find that they are having difficulty servicing the smaller accounts on the discount which they are being given by the manufacturer. So again, as with everything else, the trend toward bigness occurs here too.

Mr. HORTON. What would seem to indicate to you that if you administratively change this, that it would not occur still? In other words, that competition would be such that you still wouldn't get to the small businessman.

Mr. MILLSTEIN. I think most of our members would like to service the smaller account. The only reason they don't is that there is not enough margin.

Mr. HORTON. We are talking about margin, but if administratively it is changed so that you could do this and get a discount, what is to say that 3 years from now or 5 years from now you won't be back in the same situation because the discount isn't big enough and so forth, and you are going to have to cut back?

Mr. MILLSTEIN. I think that is a matter, Mr. Horton, that businessmen have to live with. What we are asking for and what we are hoping that the Commission will some day say in some cases, is that you can go in and negotiate for these discounts. If we can't get them, if the manufacturer won't give them to us, that is another story. I can't ask the U.S. Congress or the Federal Trade Commission to do my client's job of negotiating with the manufacturers. All I am asking for is to remove the legal impediment and let them start the negotiation.

Mr. HORTON. What I am trying to find out is, if I make a change because I want to try to encourage the small businessman, to help the small businessman, what assurance do I have that the small businessman is going to be helped and he is not going to be out on the street again in 5 years or so?

Mr. MILLSTEIN. The only assurance you have is to take a look at this industry and see that it is servicing smaller retailers. That is what they go into business for, that was the whole purpose of getting into business. And that is what they would like to keep doing.

Mr. HORTON. Thank you.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. Mr. Millstein, I thought I understood you to say that you even paid the advertising on these items.

Mr. MILLSTEIN. Yes.

Mr. POTVIN. Now, title having passed, I expect you were perhaps using a shorthand phrase for granting a promotional allowance.

Mr. MILLSTEIN. We will actually in some cases take ads in the newspapers. This is really a very hopscotch operation.

Mr. POTVIN. Yes indeed, it is.

Mr. MILLSTEIN. Unfortunately it works.

Mr. POTVIN. Well, I am not sure it is unfortunate.

Mr. MILLSTEIN. I mean in this sense, Mr. Potvin, that the problem that you are having is precisely the problem that the Commission is having, trying to figure out what kind of fellow is a fellow who passes title but nevertheless advertises in the newspaper for the retailer to whom he has sold the merchandise.

Mr. POTVIN. What you are saying if, if you service, for example, 15 retailers in a given community, you might well, over time, run at your expense an advertisement in the name of, so to speak, each individual.

Mr. MILLSTEIN. Exactly.

And if you want me to compound the confusion, we also will collect promotional moneys from manufacturers. And we had quite a to do with the Commission about our right to do that.

Mr. POTVIN. Does the Commission treat this as a promotional allowance.

Mr. MILLSTEIN. No. Let's say, for example, Colgate or another manufacturer is going to come out with a retail promotional allowance to advertise toothpaste. Since the toiletry merchandiser is going to do the promotion, he will actually collect it. But that of course is with the permission of the retailer, who says, go ahead and get it, you are going to do the promoting.

Mr. HORTON. What is the magic about this matter of the transfer of title? Is there some reason for that?

Mr. MILLSTEIN. Surely. The merchandiser gets paid, that is all.

Mr. HORTON. I understand that. It is purely and simply that?

Mr. MILLSTEIN. Yes. Because the merchandiser turns the money over quite frequently. This is a high turnover business. They would like to get paid the minute the merchandise goes in the store.

Mr. HORTON. Couldn't you get paid even though there wasn't a transfer of title.

Mr. MILLSTEIN. I suppose. But I don't think that the business grew up to meet legal concepts. That is the way it grew up.

Mr. HORTON. Does the matter of title have any bearing on this matter of the Robinson-Patman Act?

Mr. MILLSTEIN. It does, that is the whole issue.

Mr. HORTON. That is what I am trying to get at, what is the problem.

Mr. MILLSTEIN. The whole issue with the FTC is, the FTC says, you turn title over to the retailer, and therefore you are a wholesaler, and as a wholesaler we have to treat you the same as every other wholesaler.

Mr. HORTON. If you didn't turn title over you wouldn't be treated as a wholesaler?

Mr. MILLSTEIN. No; we would be treated as a retailer, and that would probably be worse. Then the manufacturer would say, if I do have wholesaler discounts, I can't even give you the wholesaler discount. This way he can give us the wholesaler discount, but he can't give us anything over the wholesaler discount because we perform more services.

Mr. HORTON. Is there any other way under the interpretation that you can get that?

Mr. MILLSTEIN. Yes; I was trying to say that.

Mr. HORTON. I shouldn't say can get. Is it possible under the present interpretation that other people situated such as this are getting discounts?

Mr. MILLSTEIN. No—

Mr. HORTON. There are no discounts?

Mr. MILLSTEIN. No. We are not being discriminated against, I am not here even remotely suggesting that. We are getting nothing.

Mr. HORTON. In other words, there is no precedent at the present time for what you are talking about?

Mr. MILLSTEIN. No. The reason there is no precedent, however, is that the FTC has taken the position that you may not pay a wholesaler an additional amount of money to reward him for performing additional services. There have been several cases, General Foods, for example, where Commissioner Gwynne wrote an opinion saying that you could not reward the wholesalers who were performing over and above services for performing those services. This is one of those anomalies under the Robinson-Patman Act, because in this particular case that sort of decision comes back to hurt the smaller businessman, rather than help him.

Mr. HUNGATE. Do you have a form of agreement, written agreement that is entered into when you establish one of these outlets?

Mr. MILLSTEIN. We have no standard form. Some of the TMA people do enter into contracts, and some don't. I would say—

Mr. IMMERMAN. Most of them do not, not written.

Mr. MILLSTEIN. Most of them do not enter into written agreements.

Mr. HUNGATE. I thought if you had one of those, that would probably be helpful to the committee, if the agreements are ever reduced to writing that would help up to understand a little better.

Mr. MILLSTEIN. If we can find one we would be delighted to do it. Most of it is done by oral agreement.

Mr. HUNGATE. If you ever locate one you have leave to file it with the committee 30 days from this date.

Mr. MILLSTEIN. We would be pleased to do it.

Mr. HUNGATE. And if you can't locate one, let us know.

Mr. MILLSTEIN. We would be pleased to do that, too.

Mr. HUNGATE. Suppose I have got a small store somewhere, and I decide to go in for this, and we make the deal, but I don't have enough cash?

Mr. MILLSTEIN. You haven't got enough cash?

Mr. HUNGATE. No.

Mr. MILLSTEIN. That is unfortunate.

Mr. HUNGATE. How do we work that out?

Mr. MILLSTEIN. Mr. Immerman says that he guarantees you if it is a good store you will be put on and you will get credit.

Mr. HUNGATE. Do we at that point sign some kind of agreement?

Mr. MILLSTEIN. I really don't know the answer to that.

Mr. IMMERMAN. I can't answer it, except to say that I am sure that I am coming in as a salesman to sell you, and I am going to make every effort to sell you, and if you are willing to buy I am going to find a way to do business with you.

Mr. HORTON. Do you help to finance that kind of situation?

Mr. IMMERMAN. Certainly.

Mr. HORTON. Do you finance it?

Mr. IMMERMAN. We pay our suppliers for the merchandise that we have in our warehouse, and we are supplying him with our merchandise. The wholesaler—

Mr. HORTON. Under Mr. Hungate's example, do you finance an operation?

Mr. IMMERMAN. Certainly.

Mr. HORTON. Do you loan them money?

Mr. IMMERMAN. It would be comparable to a consignment where at the end of each year we would pick up the inventory and be paid for that what was sold. We would work out some arrangement with him. That is how we started with some of the small stores.

Mr. MILLSTEIN. Do you, in fact, do that?

Mr. IMMERMAN. Yes; we do.

Mr. HUNGATE. At that point I presume I would sign something.

Mr. IMMERMAN. You would sign a consignment paper or something to the effect that you are indebted to us, or that merchandise belongs to us, because in the event that anything would happen to your business enterprise, at least we want to recover this merchandise which belongs to us.

Mr. HUNGATE. If the building burned and I collect the insurance, you want something to show for it?

Mr. IMMERMAN. That is correct.

Mr. MILLSTEIN. We will look for such an agreement. I see exactly what you are getting at.

Mr. HUNGATE. In the first few years of my law practice I didn't have anything like this, but certainly I had well-known distributors of similar articles. And I think every year they had a distributor, local outlet man—every year I handled his lawsuit defending him because they had signed up and they had two neighbors to sign up, and if they didn't pay they would go to see your grandfather, and that sort of thing. And it was a very difficult arrangement.

Mr. MILLSTEIN. I know what you are talking about. I assure you these arrangements are terminable at will, and the toiletry merchandiser can be dispensed with.

Mr. HUNGATE. This is the problem that comes in, as to how much merchandise was left on the shelf, and how much they took back, and

how much money should be allowed if the market changes in the meantime.

Mr. MILLSTEIN. We don't have that problem, because if the market changes we change the price of the merchandise to the retailer to assure him his desired profit.

Mr. ODEN. Mr. Millstein, do you see any indication of the Commission loosening its policy on this, particularly with regard to the recent advisory opinion that was issued dealing with an automotive wholesale retailer.

Mr. MILLSTEIN. Well, I do see a possibility that it is loosening. I have here advisory opinion No. 333 that was issued on April 18, 1969, where the commission indicated that it was willing to study the problem. And that is the first time that they have said anything other than "no" to this problem. I did go in and see Commissioner Nicholson, former Commissioner Nicholson, unfortunately, and had a chat with him about it. We had been planning to make a presentation to the Commission sometime in the near future to get the Commission to actually rule on this.

The difficulty is that the normal inclination of a lawyer and a client is not to get somebody to rule on something if you know they are going to say no. And we would hate to be told flatly no, because that would rather close the issue precipitously once and for all. So we are at the moment having councils of war among ourselves as to whether or not advisory opinion No. 333 is sufficiently hopeful to warrant our going in and asking for review.

Mr. ODEN. I was speaking more specifically as to the advisory opinion they issued in December in the automotive parts industry in allowing a wholesaler to also perform retail functions.

Mr. MILLSTEIN. I don't think that that one reads expressly on our problem.

Mr. ODEN. But it is an indication that they are loosening up their old concepts of manufacturer, wholesaler, retailer, and they all have to be completely distinguishable from the rest.

Mr. MILLSTEIN. I think that is right. I think that the criticisms which have been leveled by people like the ABA Commission and others who have studied this, that the Commission should begin to make realistic interpretations of the statute, is beginning to have an effect on the Commission. But the change is so minor it is hard to observe with the naked eye at the moment.

Mr. POTVIN. Mr. Millstein, you mentioned your conversation with former Commissioner Nicholson. That brings to mind a recurring difficulty that I think all meinbers in the antitrust bar have. And I would like, if I may without imposing, to ask for your views on this subject. Since, of course, there are no written rules or admonitions as to when one may or may not with propriety discuss pending matters with members of the Commission, do you feel that it would be an altogether useful contribution if there were such rules so that one wouldn't feel hesitant?

Mr. MILLSTEIN. I was a member of the ABA Commission, as you know, and I was strongly in favor of the recommendation we made in the report, which was to get out and on the table a description of when it was appropriate and when it wasn't appropriate to have conference with commissioners. I read Mr. Kirkpatrick's testimony.

I don't know of any specific instances. I am not saying that anybody has ever abused this privilege, I don't know, but I certainly would like to know the rules of the road. And I think for those attorneys that don't practice in Washington it is even more important.

Mr. POTVIN. The point is that you find yourself in a bind, as it were, in that you dare not do less for your client than you may properly do. On the other hand, together with your colleagues, you, of course, are not about to overstep or commit an impropriety.

Mr. MILLSTEIN. The difficulty is, you don't know what the impropriety is.

Mr. POTVIN. You don't know where the line is.

Mr. MILLSTEIN. That is exactly right. And you hear all sorts of stories about, this fellow popped in to see Commissioner so-and-so on a pending matter. That has not been my practice. And I don't know whether I am doing my client a disservice.

Mr. POTVIN. Some members of the bar made the observation that in the absence of identifiable procedures or regulations, that a Gresham's law sort of goes to work. You hear the rumor that opposing counsel has been inordinately present at the desk of a given commissioner, and you have to ask yourself, dare you do less.

Mr. MILLSTEIN. That is right. I still think that most members of the bar, though, have a reluctance to talk to the judge on a pending matter. That is the way you are brought up in the profession. And I know I was taught at an early age that you just don't talk to the judge. I sometimes even wonder about it at dinners and the like. But it is just something that you don't do. If there is a different rule with the Federal Trade Commission it is something that I would like to see stated.

Mr. POTVIN. Mr. Chairman, rather than asking a line of questions at this time I would like to secure permission of the Chair, and the witness, hopefully—your practice gets into the field of fabrics considerably, various textiles, woolens, flammables?

Mr. MILLSTEIN. We represent some of those people. And we represent a number of retailers, too.

Mr. POTVIN. And there was, of course, a great deal of reference to this sort of enforcement work. As I believe the word for that day was trivia in the ABA report.

Mr. MILLSTEIN. Right.

Mr. POTVIN. Now, let us first of all see if we can agree to some distinction, and then submit some written questions to you that I might answer at a more convenient time and submit for the record.

Mr. MILLSTEIN. In connection with textile labeling and so on?

Mr. POTVIN. Yes.

Mr. MILLSTEIN. Yes, I would like to be of help to the committee.

Mr. POTVIN. Now, for the record, would it be safe to say that in speaking of trivia you would not include the flammable statute?

Mr. MILLSTEIN. No. Anything that has to do with health and safety I would not include in the term trivia.

Mr. POTVIN. Bearing in mind that during the last fiscal year 111 of the 599 items tested failed to pass the test, it becomes apparent that it is not trivia.

Mr. MILLSTEIN. Mr. Potvin, if the ABA report intimated that I must have missed it some place along the line, because I know in our

commission discussions the view was uniform that anything that had to do with health and safety obviously is not trivia. And that includes flammable fabrics.

Mr. WERTHEIMER. What then was the direction of the statements concerning trivia?

Mr. MILLSTEIN. Some of the examples given in the Commission report I thought demonstrated the type of thing; in other words, where "N.Z." was put down instead of New Zealand, and a whole proceeding was brought on that, one would wonder why the Commission should waste its time. There were various examples of fur labeling and textile labeling, misdeeds that were so minor that you wonder why the Commission ever started the administrative wheel going. This is what we meant by trivia.

Mr. WERTHEIMER. Didn't the report also make a finding that too much of the resources of the Commission were involved here?

Mr. MILLSTEIN. I think the most striking finding that the report referred to in this respect was the fact that in the area of false and deceptive advertising and retail frauds, for example, with which I am very familiar working in the field, they had 12 lawyers, the Commission had 12 lawyers assigned to study important projects, whereas they had 100 personnel working on labeling. Games of chance and lotteries—these are the projects that really are interesting—retail house-to-house fraud in the selling of encyclopedias—that is an important project—these types of projects had 12 lawyers assigned to them totally, whereas labeling had 100 people assigned to it, and lots of dollars assigned to it.

Now, we weren't unrealistic. We realized that it is popular for the Commission to come before Congress and say, "Look at all the work we are doing on these labeling statutes that you assigned to us, we need dollars for that." But it should also be popular to come before Congress and say, We need dollars for these other important consumer projects."

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. HUNGATE. Any other questions.

(No response.)

Mr. HUNGATE. I want to thank both of you gentlemen for your very helpful and refreshing testimony. And as the son of a traveling salesman for an automotive wholesaler, I have enjoyed your testimony. Thank you.

Mr. Potvin.

Mr. Potvin. Mr. Chairman, I have received word from the chairman of the subcommittee that because of debate on the National Timber Supply Act this afternoon the subcommittee does not have permission to sit.

Therefore, I would ask permission that the full remarks of Mr. Harold T. Halfpenny, counsel for the Automotive Service Industry Association, appear in full at this point.

(The document follows:)

STATEMENT OF HAROLD T. HALFPENNY

My name is Harold T. Halfpenny, and I appear here today as legal counsel to the Automotive Service Industry Association. The members of that Association are engaged in the automotive aftermarket, an industry which has had considerable prominence in antitrust law.

A.S.I.A. is a national trade association with a membership of over 5,000 independent automotive wholesalers, warehouse distributors, parts rebuilders, and manufacturers of automotive replacement parts, tools, equipment, chemicals, paint, refinishing materials, supplies and accessories. Its members are located in all fifty states.

That this industry has received the close attention of the Federal Trade Commission over the years is a result of the unusual complexity of its distribution system. That complexity is the natural result of two factors: (1) The necessity for ready availability of replacement parts every place in the country; and (2) the incredible number and variety of products involved.

Distribution in the automotive parts industry means service, immediate service, in obtaining replacement parts without delay. Since the average auto, truck or bus has something like 15,000 parts, and there is an infinite variety of parts because of the many different makes and models on the roads today, this involves the distribution of over 320,000 parts. The actual servicing is performed by some 33,000 automobile dealers, 211,000 service stations, and 110,000 independent garages. These customers in turn are serviced by some 500 independent manufacturers and 21,000 wholesalers who make up the "automotive aftermarket" industry.

But this distribution is not merely a matter of selling one's product to wholesalers who resell to retailers. In fact, there is no "pattern" of distribution in the automotive parts industry. The parts distribution business requires the stocking of innumerable types and sizes, including oversizes to compensate for wear; constant attention to inventories because of high obsolescence factors; a sales force thoroughly trained in the mechanics of automobiles and engines; and eventually high speed re-distribution of small-quantity lots as needed by the garage mechanics, frequently in out-of-the-way places.

Some distributors are willing and able to do more of this work on behalf of manufacturers than are others. When an item is needed by a garage mechanic it must be found. It may be purchased by the garage mechanic from a local jobber who gets it through an area warehouse distributor from the plant or a regional warehouse of the manufacturer. Each has contributed to locating or delivering the item, or both. Some have stocked it for a time. Some have contributed to the passing on of the technical knowledge required for its proper installation or use. Each is entitled to, and in order to stay in business must receive, some compensation for his contribution to the distribution of the part.

It should be emphasized that although the total automotive industry is a large one (about \$15 billion), the independent businesses here described are not "big" business; on the contrary, they are for the most part "small" business.

A few figures indicate the size of the businesses involved: Of the wholesalers, 79% have an annual volume of less than a million dollars; 69% are under a half-million dollars, and 11% under \$150,000. Of the manufacturers, 80% have an annual volume of less than ten million dollars, and 56% have less than three million.

It was the original purpose of the Robinson-Patman Act to protect "small" business by restraining "big" buyers (such as chain store retailers) from obtaining price favors. It is an odd twist of enforcement which made this industry of small business one of the principal targets of the enforcement of that Act.

THE AUTOMOTIVE CASES

On December 20, 1949, the Federal Trade Commission issued five complaints, four against manufacturers of automotive parts and one against several buyers of those parts. On May 1, 1950, it issued two more complaints against buyers and four more against manufacturers.¹ This was the beginning of the well-known "automotive cases," and the bell weather cases came from this group, although more complaints were issued against both manufacturers and buyers in the years that followed.

The manufacturer cases asserted that a price discrimination took place when a manufacturer sold at warehouse distributor prices to an entity composed of small jobbers, when the entity was a mere bookkeeping device for the collection of discounts. By such a device, members of a group, by aggregating their orders, received larger discounts than they would otherwise have received, to the detri-

¹ These cases are cited in the Appendix.

ment of competitor jobbers not members of the group. The buyer cases asserted that the jobbers knowingly received a price discrimination by the solicitation and receipt of such accounts.

These charges were eventually upheld by the courts; from the point of view of enforcement, the interesting thing is the order in which they reached the stage of court decision.

The manufacturer cases had cease-and-desist orders entered in 1955 and 1957, which were affirmed by Courts of Appeal in 1956, 1957 and 1959. The buyer cases, on the other hand, were subject to cease-and-desist orders in 1959, and were affirmed in the courts in 1960 and 1961.

This lag on the part of the buyer cases can be explained from the Commission's point of view; it was easier, and in fact more efficient, to proceed first with the manufacturer cases. Evidence was easier to obtain, and when obtained could be re-used in the buyer cases.

Nevertheless, the ten-year span between the issuance of the complaints in the buyer cases, and their resolution in court, caused utter confusion in the industry. It is an enlightening example of the disadvantage of attempting to resolve any industry-wide problem on a case-by-case basis.

In the "automotive cases," the case-by-case method of the resolution of problems had another disadvantage—it didn't solve anything. All of this litigation has failed to result in adequate guidance for future conduct.

For example, in one buying group case² the plan accepted as compliance allowed former jobber members to remain as creditors of the new corporation formed to conduct a warehouse. This was confusing because the Commission had previously regarded practically any degree of common ownership or financial affiliation between jobbers and warehouses as objectionable. The Commission's administrative decision that a jobber may be a substantial investment creditor of a warehouse of which it is a potential customer was a radical departure from earlier criteria.

This whole subject has been further complicated by a recent advisory opinion on common ownership of auto parts wholesaler and auto parts retailers which has caused much comment and raised many questions.

The Federal Trade Commission's release dated December 16, 1969, is as follows:

"The Commission recently issued an advisory opinion relative to the common ownership of an automotive parts wholesaler and automotive parts retailer. The wholesaler would sell to all retailers (including its commonly owned retailer) within its trade area on a non-discriminatory basis.

"The Commission expressed the view that the common ownership of the automotive parts wholesaler and automotive parts retailer would not violate any law administered by the Commission, as long as the wholesaler entity did not favor the retail entity with discriminatory discounts not made available to the competitors of the retailer entity.

"Commissioner MacIntyre did not concur in the opinion.

"Chairman Dixon does not agree with this opinion. It is his view that the wholesale and retail operations are so closely connected that a benefit conferred on one in the form of a lower discriminatory price would necessarily result in a direct benefit to the other. Under these circumstances, Section 2(a) and/or 2(f) of the Clayton Act may be violated regardless of whether there is an actual transfer of all or part of the wholesaler's discount to the retailer."

The advisory opinion is silent with respect to factors other than common ownership which, according to many decisions of the courts and the Federal Trade Commission itself, can affect such a relationship so as to make unlawful the granting and receipt of certain discounts to such dual-function business or businesses.

For example, the automotive cases (Moog, Whitaker, Edelmann, Niehoff, Sorenson, etc. and associated group buyers) have consistently held that where a "warehouse distributor" owned by jobbers is merely a purchasing agency for the jobbers, the granting and receipt of W.D. discounts on such purchases is unlawful.

More recently, it was held in the Monroe Case that where a W.D. and its jobbers "operate as a single unit so that any benefit conferred on one would, in the light of business realities, result in a direct benefit to the other," the granting of W.D.

² National Parts Warehouse, Dkt. 8039 issued 7/12/60; order to cease and desist 12/16/63; affirmed 9th Cir. 7/28/65.

discounts on all its purchases is unlawful. In this case, there was evidence that some of the W.D.'s controlled many of the purchasing, selling, financing, paying, credit extension, and other business management policies and functions of affiliated jobbers, to an extent that "for all practical purposes these organizations operate as a single unit."

Throughout the twenty-odd years of litigation over this subject, we have consistently expressed the opinion that mere ownership by one or more persons of the capital stock of both W.D. and a jobbing business does not under the law, prevent the W.D. from receiving W.D. discounts on all purchases resold to jobbers (including the stock-controlled jobber),—provided that each business is separately operated and managed in its own best interest, independent of the other, and treated exactly as though it were an independent, unaffiliated business.

This advisory opinion of the FTC finally appears to confirm such judgment, but is far from being clear and explicit.

COMPETITION OR COMPETITORS

The automotive cases also illustrate another facet of the Robinson-Patman Act—the interpretation of the provision that a price discrimination is a violation of law when it injures competition. There has been a good deal of discussion about whether this means injury to a particular competitor, or to competition in general.

The Federal Trade Commission has always equated a price difference with price discrimination—a reading of the Act which has been subject to frequent criticism. In one of the manufacturer cases, the court in its consideration of this issue refused to give any effect to the testimony of non-group jobbers (also customers of the manufacturer) who testified that they were not injured competitively by the group-buying practice. The court said that a witness would not be permitted to "deny a mathematical fact," that is, that he must have been competitively prejudiced by paying more than his rivals.⁸

It is submitted that the Commission's interpretation actually stifles competition. Instead of spurring customers on to exerting greater sales and promotion efforts to sell a manufacturer's goods in order to get a lower price, the Commission's interpretation forces a manufacturer to charge the same price to a customer providing full services as when selling to one who does not provide such services and doesn't care to do so.

FUNCTIONAL DISCOUNTS

The Robinson-Patman Act does not mention "functional" discounts, but merely condemns discriminatory prices which injure competition. On the other side of the coin, functional discounts are allowed so far as they do not injure competition. Thus wholesalers may receive greater discounts than retailers, on the theory that they sell only to retailers and not to consumers, and so are not in competition with retailers.

In considering functional discounts, the Commission has not looked beyond two points: a price difference, plus competition between the recipients of the two prices, it stubbornly regards as a violation of the Act. It has clung to this equation in complete disregard of efforts and achievements by the several customers of the manufacturer, and of the right of a manufacturer to obtain as many varying channels of distribution as his business may require. Thus the Commission in a recent advisory opinion has refused to allow a greater discount for "stocking" jobbers than for "non-stocking" jobbers, despite the fact that the "stocking" jobbers carry an inventory of his products and thus materially assist the manufacturer in obtaining prompt and economical distribution.

COST JUSTIFICATION

Under the express terms of the Robinson-Patman Act, a price difference is not a violation of law if it does not exceed the seller's differences in the comparative costs of doing business with the customers receiving the different prices. In the words of the Act, price differentials are not prohibited if they make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the commodities are sold or delivered to the purchasers.

⁸ Moog Industries, 238 F^{2d} 43 (8th Cir. 1956).

Despite this clear mandate of the Congress, few cost justifications have succeeded in reported decisions, and "cost justification under Section 2(a) has proved complex and frustrating in practice."⁴

It is suggested that this complexity and frustration could be alleviated by the Federal Trade Commission's setting guide-lines on the subject. This would be a difficult but not impossible task, the performance of which would be of great benefit to many businesses. In addition, it would carry out the Congressional intent of the Act.

GOVERNMENT AS A COMPETITOR

In the view of many businessmen, an ironic twist is provided to the Robinson-Patman Act by the fact that the Government is constantly the recipient of favorable discriminatory prices, thereby violating its own principles. This results from the fact that, while the Act is silent on the subject, its legislative history and subsequent interpretation support the proposition that sales made to Federal or State governmental bodies are not subject to the provisions of the Act.

This may be injurious to competition in several ways. First, there is the problem of injury to "first line" competition, where one seller engages in predatory price cutting to a buyer in order to destroy a competing seller.

Second, there are "second line" situations where competition exists between the Government and private industry in the resale of commodities.

Third, this practice injures the competition of wholesalers when their supplier decides to sell directly to a government at a discount, withdrawing the former use of wholesalers in the chain of distribution. This happened recently in the case of the General Electric Company which notified its distributors on May 5, 1969 that: "The Army and Air Force Exchange Service has informed us that in the future it will purchase practically all electric housewares products directly from manufacturers."

The Federal Trade Commission has not recommended legislation to make the Robinson-Patman Act applicable to sales to governmental purchases. However, in our opinion Congress should consider acting on its own volition. The United States Government should abide by its own laws pertaining to business matters.

SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Section 5 of the Federal Trade Commission Act, prohibiting unfair methods of competition, is the unique weapon of the Federal Trade Commission. It is a weapon which has been constructively and imaginatively used in the past, and should be used increasingly in the future.

The term "unfair methods of competition" was not defined in the Act so that the Commission could exercise latitude, and could have the flexibility necessary to prohibit any practice which restrains competition or which might restrain it if not stopped in its incipient stages. The Act may be used to prohibit a practice which is expressly condemned by any of the other antitrust laws, or a practice which is not covered by them. The Commission has used this in a wide variety of ways, one of the most constructive of which was in our industry.

During the period from 1955 to 1966, the Federal Trade Commission was engaged in proceedings against the major oil companies. It charged that certain practices of these companies in selling tires, batteries and accessories (TBA) through their retail gasoline stations constituted unfair competition under Section 5. Articles of TBA were produced by large rubber companies and sold by them to the gasoline stations. The oil companies received commissions on such sales. The Commission contended that, through the oil companies' economic power over them, as well as through outright coercion, the dealers were required to purchase the sponsored TBA. The Commission found that this foreclosed the independent suppliers of TBA from the gasoline station dealer market.

This theory was upheld by the United States Supreme Court in an opinion in the *Atlantic Refining* case,⁵ and again in a case against *Texaco*.⁶ The Commission's use of Section 5 was vindicated.

The ink was hardly dry on the Supreme Court opinions before the major oil companies were seeking ways to circumvent the law, so as to retain the TBA

⁴ Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 266.

⁵ *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

⁶ *FTC v. Texaco, Inc.*, 393 U.S. 223 (1968).

market by some other means. Shell Oil and Texaco immediately arranged to sell private brands of TBA to their gasoline station dealers.

It soon became apparent that the new methods of merchandising were as harmful to independent manufacturers and distributors as the commission system had been. Automotive Service Industry Association accordingly filed new complaints with the Commission, demonstrating the harmful and anti-competitive effect of the oil companies new system of selling.

The Federal Trade Commission has demonstrated a real interest in the problem, and is engaged in a field investigation at the present time.

This is an example of a very real wrong for which the only apparent remedy is action by the Commission under Section 5 of the Federal Trade Commission Act. It clearly demonstrates the capability of a far-sighted law combined with effective administrative action.

INFORMAL PROCEDURES

It has been advanced as a criticism that the Commission on occasion brings pressure to bear to induce voluntary settlements of pending charges, or of possible charges. In our opinion, this criticism is unwarranted, since such settlements save a great deal of time, money and energy for both the Commission and the parties involved.

We have mentioned above the inordinate amount of time which can be spent on these cases if every possible delaying tactic is adopted. In most cases a prompt settlement is better for everyone.

VOLUNTARY COMPLIANCE

From bitter experience, referred to above, the automotive replacement industry has cause to applaud the Commission's recent efforts to achieve industry-wide voluntary acceptance of the law, uniformly applied to all in the industry. As a Commission representative said in a speech in 1968: "In our last fiscal year, with an appropriation of but \$14,403,000, it was patently impossible to regulate the nation's \$775 billion economy by bringing a few hundred adversary actions against the violators of the law. Common sense dictated that if trade laws had to be obeyed, only the willingness and self-interest of reputable businessmen to comply with them would achieve a fair and orderly marketplace."⁷

ADVISORY OPINIONS

During the past five years, the Federal Trade Commission has made use of the very helpful device of issuing advisory opinions at the request of individual businessmen. Anyone may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy, where practicable, to inform the requesting party of the Commission's views. Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice.

An advisory opinion is binding on the Commission until rescinded or overruled. Of the four hundred opinions issued by the Commission to date, only two have been rescinded, one involving bad faith on the part of the requesting party.

Summaries of the advisory opinions have been made public, and are very useful in judging what the position of the Commission will be on similar propositions. The advisory opinions have been particularly useful because of the wide range of subject matter covered. We have mentioned the "stocking jobber" opinion; others have been concerned with such practical and timely subjects as: advertising allowances; uniform warranty plans; exclusive franchise arrangements; activities of trade associates; brokerage; discounts; when foreign origin must be disclosed; refusals to deal; and many others.

This is the kind of service which is welcomed by the business community, whose members for the most part want to obey the law if they can find out what it is. We congratulate the Commission for having initiated it. In addition, the Commission's recent determination to publish its advisory opinions in full, rather than brief summaries, should add materially to the value of this helpful activity.

⁷ John McCarty, Attorney in Charge, Boston Field Office, 3/22/68.

On the other side of the coin, it has been announced that that names of the persons or firms requesting the opinions will also be published. It seems probable that this will cause a decline in requests. This would be unfortunate.

Another useful activity is the Commission's industrywide rules and guides. These seem to us (in disagreement with some other commentators) to be much fairer, more useful and more expeditious than the case by case method of enforcement. Anyone who chooses to dispute a particular rule or guide is still free to litigate the proposition. But with assurance of almost total industry compliance, a businessman no longer need fear that if he alone eliminates an unlawful practice, he will lose his customers to competitors who likewise are afraid to eliminate the practice.

THE FEDERAL TRADE COMMISSION AND SMALL BUSINESS

The Federal Trade Commission has a role in government far more important than the formal issuance of complaints. Under its informal procedures, including investigations of complaints, it is the one forum to which the small businessman can turn when he has been subjected to what he regards as an injustice.

For example, several years ago, independent garagemen complained to the Commission that they were being harmed by the refusal of the major vehicle manufacturers to sell body-repair parts to the independents at the same price as to their competitors, the franchised car dealers. The Commission was successful in persuading the vehicle manufacturers to voluntarily remedy this situation. In this situation, the Commission was the only hope for these small businessmen.

Experiences like this lead us to disagree with the conclusion of the Report of the Nixon Task Force that:

"The efforts of the Commission to protect small dealers from allegedly unfair and coercive business practices constitute a dark chapter in the Commission's history."

On the contrary, aside from its myopic interpretations of the Robinson-Patman Act heretofore mentioned, we believe that the Commission has done much to protect small businesses, and that this is the primary reason for its existence. In fact, insofar as the automotive service industry is concerned, the Commission's activities under Section 5 of the Federal Trade Commission Act represent by far the finest work of any government agency in maintaining competition in the market place.

CONCLUSION

In addition to its obligation to enforce the Federal Trade Commission Act and the Clayton Act as amended by the Robinson Patman Act, the Federal Trade Commission has been assigned numerous additional responsibilities.

These include enforcement of the Wool Products Labeling Act, Fur Products Labeling Act, Textile Fiber Products Identification Act, Flammable Fabrics Act, and the Fair Packaging and Labeling Act, each with reference to certain products. In addition, the Federal Trade Commission Act includes not only Section 5 (prohibiting unfair competition and deceptive practices), but also Section 12 which prohibits false advertisements of food, drugs, devices, and cosmetics. Add to this the Clayton Act prohibition of certain corporate acquisitions and mergers, and you have a truly awesome array of subject matter assigned to one agency.

As the list of its responsibilities indicates, the Commission is in danger of becoming primarily a consumer-protection agency. That is a much more popular and newsworthy field of endeavor than solving price discrimination and market domination problems. Thus, it is not surprising that the Commission is tending to give consumerism a good deal of attention.

It is suggested that this incongruous combination of areas of responsibility is dangerous and inefficient. Dangerous, because of the temptation to indulge in the more sympathetic activity; and inefficient because it requires two entirely separate staffs with different experience and objectives. A division of these areas of responsibility, in order to preserve the Federal Trade Commission as an administrative body established for the help and guidance of small business, should be a matter of real concern to Congress.

APPENDIX

(A) MANUFACTURERS' CASES

Bohn Aluminum & Brass Corp., Docket 5720, issued 12/20/49, dismissed 5/22/55.

Standard Motor Products, Docket 5721, issued 12/20/49. Order to cease and desist 12/27/57; Affirmed Second Circuit 4/15/59 (Order subsequently reconsidered and enforcement eventually denied, Second Circuit 1/9/67).

Whitaker Cable Corp. Docket 5721, issued 12/20/49, order to cease and desist 12/27/57. Affirmed Seventh Circuit 12/14/56, and certiorari denied.

Moog Industries, Inc., Docket 5723, issued 12/20/49. Ordered to cease and desist 4/29/55, affirmed Eighth Circuit 11/5/56.

C. E. Niehoff & Co. Docket 5768, issued 5/1/50; order to cease and desist 5/17/55. Modified and affirmed, Seventh Circuit 1/9/57; decision remanded with directions to affirm FTC order, U.S. Supreme Court 1/27/58.

Federal-Mogul Corp., 5769, issued 5/1/50. Consent to cease and desist 6/9/58.

E. Edleman & Co., Docket 5769, issued 5/1/50; order to cease and desist 5/1/50. Affirmed Seventh Circuit, 12/14/56 and certiorari denied.

Namco, Inc., Docket 5771, issued 5/1/50; order to cease and desist 3/17/53.

(B) BUYERS' CASES

American Motor Specialties Co., Docket 5724, issued 12/20/49. Order to cease and desist 3/12/59; Affirmed Second Circuit 5/5/60.

Borden-Aichlen Auto Supply Co., Docket 5766, issued 5/1/50. Order to cease and desist 1/24/59, affirmed Fifth Circuit 2/23/61.

Cotton States, Inc., Docket 5757, issued 5/1/50. Order to cease and desist 1/24/59, affirmed Fifth Circuit 2/23/61.

Mr. POTVIN. Further, may we have the consent of the Chair to submit written questions to Mr. Halfpenny, and that they, together with his answers, appear immediately following his statement?

Mr. HUNGATE. There being no objection, permission is granted.

The committee will stand adjourned.

(Whereupon, at 12:35 p.m., February 5, 1970, the hearing was recessed, to reconvene at 10 a.m., Friday, February 6.)

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

FRIDAY, FEBRUARY 6, 1970

HOUSE OF REPRESENTATIVES, SPECIAL SUBCOMMITTEE ON
SMALL BUSINESS AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2359, Rayburn House Office Building, Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representatives Dingell and Horton.

Also present: Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

The Chair expresses an apology for tardiness in arrival.

This is a continuation of the special subcommittee to investigate the effect of the Robinson-Patman antitrust on small business, and a number of other related matters.

The Chair is extremely honored to have a distinguished representative of consumers, a valued friend, and one with whom I have worked a number of matters, legislative and otherwise, the executive director of the Consumer Federation of America, Erma Angevine.

And the Chair notes that you are accompanied by your very able and distinguished counsel, Mr. Ed Berlin.

We are happy to welcome you both here for such statement as you choose to give.

If you would, please, for the purposes of the record, give your full names and addresses to our reporter.

TESTIMONY OF ERMA ANGEVINE, EXECUTIVE DIRECTOR, CONSUMER FEDERATION OF AMERICA, ACCOMPANIED BY ED BERLIN, COUNSEL

Mrs. ANGEVINE. My name is Erma Angevine. I am executive director, Consumer Federation of America. Our headquarters is here in Washington. We have 146 member organizations. These are community, State, county and national organizations with representatives throughout the country.

Mr. Chairman, we very much appreciate this opportunity to appear before your committee. This is the first time CFA has made an appearance before your committee. And we think it is a most appropriate time for us to be here.

We are witnessing what we view to be a most disturbing trend, the gradual but nonetheless pronounced disappearance of the small businessman.

As I will expand on in a moment, this is a grave concern to consumers—this growing loss of small businessmen.

Secondly, the administration's budget message will shortly be subjected to congressional scrutiny, scrutiny, which we hope will be addressed not only to the appropriateness of funding levels, but to the allocation of resources, to, in short, the assignment of priorities.

Let me begin by candidly advising the committee that if I am expected to offer profound insights into the operation of our antitrust laws, I will have unjustifiably intruded upon your busy schedule. I have no experience in the antitrust field, and consequently will not venture into waters that are far too deep for me.

Perhaps this is in the nature of a rationalization, but I suspect, from my review of the excellent and comprehensive record already developed by this committee, that you may have had your fill of profound insights by this time.

I do feel, however, that I can speak from some experience as to the concerns of consumers as they relate to matters coming within the scope of these hearings, a scope, I might add, that I view as being considerably broader than whether the Robinson-Patman Act should be amended.

As I indicated a moment ago, I view this as a particularly appropriate time for CFA to appear before this committee. The Robinson-Patman Act, after all, is the consumer protection act for small business. I have sensed, much to my concern, that there is some belief that consumers and small business are antagonistic. No doubt this feeling stems from the fact that many consumer complaints are directed at shoddy trade practices perpetrated by disreputable merchants.

But let us be very clear about three things. First, the small businessman has no monopoly on deceptive trade practices. In fact, those perpetrated by big business are often times more subtle, but their effect and pervasiveness is of far greater magnitude.

I notice in this morning's papers that Ralph Nader was saying much the same thing to the large businesses themselves.

Second, the overwhelming majority of small business are thoroughly reputable in every way, and indeed offer the consumer that which he is denied when forced to deal with giant corporate computers impersonal service.

Third—and let me state this as categorically as I know how—the economic well-being of the American consumer is inextricably tied to the viability of the American small businessman. If I succeed in making no other point this morning, Mr. Chairman, hopefully I will succeed in making at least that much clear. The consumer needs small business. Indeed, the well-being of consumers is dependent on the well-being of small business.

This is why we are so concerned about the systematic attack that is being waged against the Robinson-Patman Act. In many respects the amendments which have been suggested would, if embraced by the Congress, be far worse than the outright repeal of that essential legislation. For it would leave a shell of protection, but one that would be completely devoid of effectiveness. I would be the last one to recommend a repeal of the Robinson-Patman Act, but I would welcome its outright repeal in place of its emasculation, for at least then the cards would be on the table. And if the promotion of small business is still

considered a worthwhile objective, Congress and the public would be appraised of the fact that replacement measures were absolutely necessary.

I have heard it said by the champions of emasculation that the real effects of the Robinson-Patman Act is to effect price rigidity and to preclude aggressive competition. Taken literally, there is a measure of truth in these assertions. Without the Robinson-Patman Act I can readily envision an abbreviated period of aggressive price wars. I say abbreviated, because that competition will last only so long as it takes the corporate giants to free themselves of competition, and thereafter they will sock it to the consumer, who will be left without alternative sources.

We are presently witnessing the effects of concentrated control in what have to be viewed as critical industries, and we do not like it at all.

Let me try to be a bit more specific. Consumers are concerned about what is happening in the energy field. It is my understanding that between fiscal years 1964 and 1968 alone 43 electric utilities were acquired by larger utilities. Six of those acquisitions resulted in the disappearance of what the Federal Power Commission classified as class A utilities, or stated otherwise, the larger utility systems. Many no doubt assume that the acquisitions represent nothing more than the decision by the municipalities to cease operating publicly owned systems. That is not at all the case. More than half of the utilities that were grabbed up were private investor owned companies.

The difficulties which the smaller utility faces today is very similar to the difficulty that would confront the small business generally without a Robinson-Patman Act. It is the difficulty of leverage, or, rather, of its absence. To survive as a viable competitor a utility must have the capability to participate in what is commonly referred to as the economics of scale, that is, the economics of large-scale generation. But that participation has been systematically denied by the big boys, with the result that the small business systems cannot survive.

The problem has been most acute in New England, particularly as it relates to nuclear generation.

We are concerned about this trend toward concentration. We are concerned because we have seen what can happen as its result.

The consequences are dramatized by events now transpiring in a companion fuel industry, that of natural gas. Over the past several months the producers of natural gas have tried to put the squeeze on the American consumer. By loudly shouting that we are facing an eminent gas shortage, they are trying to scare the FPC into the approval of precipitous rate increases which would cost the consumers of this country in excess of \$1 billion annually. We do not believe the industry's scare campaign, and we have so told the Congress.

But we have also told them that if there is a shortage it could easily be remedied by a slight modification of Interior Department policy, a modification that would open up the development of our offshore gas and oil resources to the small businessman.

By and large, the small businessman has been denied the ability to develop those resources because of the Interior Department requirement that substantial bid or bonus prices be paid for the privilege

of securing a lease. We have no quarrel with the notion that the Government should be compensated for the development of public resources. There is no reason, however, why that compensation could not come in the form of increased royalty payments made during the productive life of the lease. The bidding procedure is nothing more than an arbitrary roadblock to participation by the smaller business enterprise.

There would be a great advantage in having great participation by the small producer. He is in the gas business. The giant producer is in the gas business only incidentally, and it will expend its resources on the delivery of needed gas only if it is unable to obtain a higher return through the investment of those resources in other and usually more dominant aspects of its worldwide operations.

I apologize for having gone on for so long on what you may view as a tangent.

Mr. DINGELL. No, Mrs. Angevine; you are discussing matters of considerable interest to the chair.

Mrs. ANGEVINE. I am not sure that it is irrelevant myself. But what is happening in the energy field is precisely, we are convinced, what would happen in the marketplace generally were the Congress to sanction any weakening of the Robinson-Patman Act.

In my opening remarks I referred to the fact that we are now approaching budget review time. And if I may intrude on the committee's time for a few minutes more, I should like to share some concerns that we have as to what we understand is the funding request submitted for the Federal Trade Commission. We all know that the Commission supposedly is the consumer guardian in Government. Notwithstanding the temptation, I am not going to proceed with a long condemnation of the Commission for its discharge of this function. More than enough has been said about this already by those with far greater insight than I. Moreover, the Commission has a new chairman. We are hopeful that this will signal a rededication of its efforts in the consumer protection area.

But the Commission will be able to discharge these essential functions only if it has such resources. If it requests too little, or if it assigns priorities unrealistically, it will be the fault of the Commission. If the President requests too little, the Commission cannot be faulted.

But let there be no mistake. The Congress too has a responsibility here. The Budget Bureau may have a strangle hold on the Commission, but the Congress is its own master. We hope that adequate funds will be appropriated.

Beyond that, we hope that the Congress will concern itself with how the Commission intends to expend these funds.

We understand that the Federal Trade Commission asked the President to request Congress to appropriate \$27,110,000 for fiscal 1971. This is \$6,110,000 more than the Commission's appropriations for this year. With these funds we feel the Commission could begin seriously to live up to its responsibilities to consumers.

However, we understand the President requested only \$21,375,000 for FTC for fiscal 1971. This is a paltry \$375,000 increase, and only half of this, \$195,000, is for programming. The rest is required to help meet the pay increases that have been voted.

This increase is less than 1 percent of the FTC's budget and is totally inadequate.

In addition, we understand that the Federal Trade Commission has been told to reassign \$500,000 from its Bureau of Furs and Textiles to other areas. We have no way of knowing whether this \$500,000 is going to other programs or whether it will go to pay increases that are voted and must be covered. We understand that 40 or more employees will be dropped from this one bureau that is being cut back \$500,000.

In conclusion, Mr. Chairman, we do not, at all, view the antitrust laws generally or the Robinson-Patman Act specifically as inconsistent with the advancement of the interests of consumers. On the contrary, we find them as being not only compatible, but essential, and would therefore urge the rejection of any effort to erode the reach and effect of those important declarations of national policy.

And, Mr. Chairman, I would like to have Mr. Berlin make some comments, for he has been much involved in this.

Thank you.

Mr. DINGELL. Mr. Berlin is well known and much respected by the Chair. And we would be happy to hear from him.

Mr. BERLIN. Thank you, Mr. Chairman.

I am really not sure what I could add for the committee's benefit beyond what Mrs. Angevine has already discussed.

I too am not an expert on the antitrust laws generally, and certainly not in the Robinson-Patman Act. But I am quite concerned about the amendments that have been suggested in the reports prepared by the two Presidential commissions.

I am concerned because of experiences that we have had over the past 2 or 3 years, particularly in the inner city areas all across this country that relate to the delivery of goods and services so essential to the residents of these areas.

As I understand the amendments that have been suggested by those Presidential committees, it would in effect deny or take out from the Robinson-Patman Act the ability to deal with potentially discriminatory practices at their incipiency. This cannot be overlooked. It would be a most significant deletion. It would be most significant for this reason. Even if we assume that the bad guys will be made to account for their discriminatory practices sometime down the road, we cannot ignore the fact that that will be sometime down the road. And in the interim the small businessman will be gone from the scene.

Now, part from having rather devastating effects on the small business man per se, this has rather wide sweeping effects in the community in which he serves.

As you undoubtedly know, Mr. Chairman, the residents of the inner city areas were particularly hard pressed following the disturbances of 2 and 3 years ago by the fact that stores that had been serving them were no longer available.

Of course, there the lack of availability was not due to violations of antitrust law, there were other circumstances that led to the demise of those enterprises. But the aftermath, I think, is relevant, because we found that residents of the area generally who did not have easy means of transportation were completely denied the ability to obtain goods and services in areas reasonably accessible to them, causing great hardship to the residents of this city.

This is why we have to be very concerned about any threat to the elimination of those kinds of enterprises, even though there is assurance—and I am assuming there are assurances under the proposal offered by the Neal and Stigler Commissions—that sometime down the road that small businessman will be made whole. However, the ability to compensate the persons who were previously served by that small businessman for the hardships that they will have suffered as a consequence of his illegal disappearance will not exist.

It is for this reason that we strongly urge that the philosophy underlying the Robinson-Patman Act—which is quite different from the philosophy underlying other aspects of our antitrust laws—to nip these kinds of serious practices in their incipiencies, be not at all departed from.

Mr. HORTON. I have a little difficulty following your relevancy with respect to the inner city problems and the Robinson-Patman interpretations. It seems to me that the inner city problem, that is, the small businessman operating in the inner city, has other factors that have come to play in his reluctance to participate. I think that we do have to try to give him encouragement, and we will have to try to give him incentives. And, of course, there has been a lot of effort to try to provide for participation in business in the inner city and this sort of thing. But much of it has to do with the fear of the small businessman, because of crime and because of the other problems that he faces in the inner city.

Could you elaborate a little bit on what you feel is the relevancy of the Robinson-Patman Act to this particular problem?

Mr. BERLIN. Yes, Congressman Horton.

Let me try and be a little more specific. I am not sure that it is perfectly clear in my mind. I will try to be as clear as I can.

As I understand the Robinson-Patman Act as it now stands, the relevant focal point of inquiry, unlike in the case of the Sherman Act, is not the market generally, the relevant market, whatever that might be, but the individual businessman who has felt the effects of the discriminatory practices that are made per se violations by the Robinson-Patman Act.

I would assume that if section 2 were amended along the lines suggested by Professor Jones, that it would require the courts to determine whether or not the discriminatory activities had an anticompetitive effect in the relevant market. I do not have very much experience in determining what is a relevant market for antitrust purposes, but I feel rather sure that the relevant market will not be the market that is relevant to the individual consumer, it will not be the 10 or 20 blocks surrounding his house. It may be the Los Angeles area, it may be even narrower than that, and perhaps will be the Watts area.

But I doubt very seriously that it will be a 10-block area, the area that the inner city consumer can reasonably expect to do his marketing in. It is for that reason that I am very concerned about shifting emphasis away from the effects on the individual businessman to the effects on what is rather amorphous to me at this point, the relevant market generally, because I am not sure that the relevant market is at all relevant to the consumers served by that market.

Mr. DINGELL. Mr. Berlin, does that complete your statement?

Mr. BERLIN. I think so, Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mrs. Angevine, it seems to me that in the field of consumer protection one of the basic problems faced by the Congress, by organizations such as yours, and indeed by at least some of the Federal agencies, pertains to the liaison or lack of same between sister agencies. Now, if you have a consumer watchdog agency, be it the FTC, or even if certain legislation is adopted creating a new one, what would your thought be if they make a finding, so to speak, as an example, that lumber is being acceptably marketed, or a fabric is flammable as the case may be, should not other agencies that are in the business of implementing on a day-to-day basis in, for example, the promulgation of standards, the policing, and so forth, should they not be required to honor the finding by the consumer watchdog?

Mrs. ANGEVINE. We very much think they should be. But this of course is not happening right now in a great many instances.

One of the things which I think would be an example of this is that the Federal Trade Commission is supposed to be enforcing the Flammable Fabrics Act. They have been highly criticized for not doing this. And yet they have only one standard set by the Commerce Department at this point to enforce. The Commerce Department has not done its job. So you have an interplay here where one agency really is limited by the activity of another.

Mr. POTVIN. And then worse, we discover that the agency now proposes to take 40 people off flammable fabric enforcement.

Mrs. ANGEVINE. Right.

Mr. POTVIN. On this question of standards in the lumber business, as an example, this subcommittee some months ago was in receipt of a letter—it was an official act of the Commission, and although signed by the chairman, it represented a docket action, and the concerted action of all five commissioners—stating that the recently promulgated lumber standard over at Commerce, if implemented in the manner indicated by the industry, would run grave risk of violating section 5 of the FTC Act. And yet here is Commerce all gearing up to go ahead and do just that. Does it not strike you that this constitutes grossly inefficient public administration.

Mrs. ANGEVINE. Very much so. We need an oversight agency, or certainly we need the Congress to do oversight committee work every now and then on some of these.

And I think the lumber standard is a very good example. As you know, about a year ago, I talked with members of this committee about reports we were getting that the lumber standards committee were holding committee hearings of its so-called advisory committee and setting lumber standards without a consumer representative present. We asked the chairman's help in trying to find out whether this was true or not. I notice in the paper that that is still an issue. So we don't seem to have solved that one yet.

Mr. POTVIN. One of the difficulties with the consumer thing of course, is that no one wears an armband, or for that matter a headband, saying consumer, and sometimes it is difficult to tell. Are you referring, ma'am, to the Jack Anderson column in the February 5 Washington Post?

Mrs. ANGEVINE. Right. I must confess that I am a day behind, since I just got back to town and haven't been reading Washington papers.

Mr. POTVIN. As I understand the incident you refer to, in appointing a consumer to a particular standards committee, as it happens on lumber, they designated the spokesman of the National Retail Association, who then stood up and said, gentlemen, I thank you on behalf of the retailers and they said in effect, shut up, you are a consumer now. So this rather illustrates the difficulty.

How do you feel on the whole that the standards programs are doing in terms of consumer representation?

Mrs. ANGEVINE. Very poorly.

Mr. POTVIN. Do you feel that this too is a common tie between the small business and the consumer community, that they are both excluded.

Mrs. ANGEVINE. Correct. We need to—we have no voice in the inner channels when they are making all the decisions, but we are the ones affected by the decisions that are made, both the small business man and the consumer.

Mr. POTVIN. One of the salient points of attack upon the Commission has been that they spend perhaps far too large a percentage of their total resources on furs and wool fabrics. Now, confining ourselves to the flammable thing, I have before me an excerpt from House Report No. 972 from the first section of the 90th Congress as issued by the Committee on Interstate and Foreign Commerce. And they found out that the Public Health Service pointed out that at least 150,000 persons a year are burned seriously enough to receive a doctor's care or to restrict their actions as a result of the ignition of clothing. Does this strike you as trivia?

Mrs. ANGEVINE. Absolutely not. I think that even one person would not be trivia. It is ridiculous in a nation that has the ability we have not to know what is in any garment that is being made. It is ridiculous to sell—for anyone to wear something that is highly flammable.

Mr. BERLIN. May I just add one thing, counsel.

Mrs. Angevine very properly pointed out a few moments ago that the responsibility in this area should not be directed solely at the FTC, because the Commerce Department has fallen far short of doing what is required of it. I was somewhat shocked at what I learned, when I spoke a couple of months ago with members of the attorney general's office of the State of New York about their experiences under the flammable fabrics legislation. New York has adopted the Federal statute and the Federal standards. They tell me that invariably the overwhelming majority of articles that are tested by utilization of the Federal standards as now promulgated by the Commerce Department, pass with flying colors. And I am talking about flammable nightgowns that are worn by small children which have resulted in several deaths over the past several years in the State of New York alone, nightgowns that ignited almost spontaneously. They tell me that practically every garment which they have tested over the last year and a half, utilizing the Department of Commerce standards that are now in existence, has passed.

So I am not entirely sure that we can be overly critical of the FTC for not having a very active enforcement program. There is really very little to enforce, in view of the abysmal failure of the Commerce Department to do any meaningful standard promulgation in the flammable fabrics area.

Mr. HORTON. Mrs. Angevine, I just want to commend you for your statement. I realize you have kind of hit the high spots of the concern that your group has in this field. You did refer to the problems of natural gas, and I assume you have done some study and some work in this particular field. But I do want to share with you my personal view, too, that this is a serious problem of protecting the small businessman, and providing him with the wherewithal that he can compete in today's market. I can assure you that is the principal motivation of this subcommittee and this committee on small business. And it is a very difficult problem. And we do appreciate your work and the work of your organization on behalf of consumers, and also your work on behalf of the small businessman. We need whatever support we can get wherever we can get it, because it is a real serious problem to try to conduct small business in the world of big business that has grown up in the last few years. And I am not condemning big business. I think there is a place for all of it. But I am personally very much concerned about the difficulties of the small businessman in existing in today's circumstances. I think your statement has helped the subcommittee very much.

Mrs. ANGEVINE. Thank you, Mr. Congressman.

Mr. BERLIN. May I just emphasize one point about the natural gas situation.

Most small business programs generally require some Federal assistance to assist and to stimulate the development of small business. The point that must be emphasized here is that we are not suggesting any new Federal program requiring any expenditure of Federal resources. We are suggesting merely a slight modification of Interior Department policy which would result in no loss of resources to the Federal Government, it would result in absolutely no expenditure of resources by the Federal Government, it would permit participation by small business, and would have as its result considerable consumer benefit.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mrs. Angevine, there is just one further point that I would like, if I may, to explore with you briefly.

There has been a great deal of rhetoric in recent months in and around Washington, and I guess realistically there is nothing unusual about that really. But directed to the point that the FTC was going to do these brave new things in consumer protection—and I don't know that it has ever been spelled out precisely, but one rather received the impression that they were going to have a friendly FTC investigator in and out of every retail store in the country, doing much more at the local level.

And this is part of a new federalism, that rather than State and local communities doing it, that it was going to be done at the Federal level by Federal investigators. Now, you seem to have some familiarity with the new budget proposal. Would you comment on whether the dollars and the bodies are being provided to turn this rhetoric into reality in your judgment.

Mrs. ANGEVINE. In my judgment absolutely not. There are only \$175,000, or something like that, not already committed for pay increases in the amount of money that has been asked for. And so

far as I have been able to learn, there are only about a dozen people that are being added to go around the country examining. And this is of course totally unrealistic.

Mr. POTVIN. Let me ask this. Does this perhaps cosmetically hide an even crueler hoax, in that I think the awareness of consumer products is a national phenomenon that is happening at the grassroots simultaneously wall to wall.

Thus we have seen that New York suddenly has what has been referred to as Virginia Knauer, North.

Mrs. ANGEVINE. I haven't heard that one.

Mr. POTVIN. If people take this rhetoric seriously as they see it, as it appears across the television or national wire services, would not it happen that the city councils or State legislatures reading that "all of these wonderful, wonderful things are going to happen by the FTC," will fail to appropriate the money, won't commence the programs to do it at the local level, because they feel that it has been preempted or at least provided for by the Federal level.

Mrs. ANGEVINE. This is one of the stumbling blocks that consumers are running into. As you may or may not know, consumers are trying all around the country to get city or county consumer representation in their governments, and they are running into the fact that, why should we vote the funds when it is all being done in Washington. And this is very real.

Mr. POTVIN. So that in addition to the failure to provide adequately at the Federal level, nonetheless talking as though you were going to has the additional effect, and perhaps the even more serious effect, of preventing adequate local action in many areas where it might otherwise have occurred?

Mrs. ANGEVINE. It is highly possible.

Mr. POTVIN. Thank you.

Mr. DINGELL. Mr. Wertheimer.

Mr. WERTHEIMER. Just following up on that point a minute, of course your basic position is that the Federal Government should be making the strongest possible efforts in this area of consumer protection.

Mrs. ANGEVINE. By all means. But I don't want them to be saying they are going to make a forward step and then not doing anything about it. I think that we must reorder the priorities in FTC, and then get the funding and get the congressional support to make it the kind of agency it should be.

Mr. WERTHEIMER. Thank you.

Mr. DINGELL. Mrs. Angevine, Mr. Potvin has discussed with you a matter of singular concern to me. And that is the capacity of the agency that we have been discussing this morning, the Federal Trade Commission, to properly carry out its statutory responsibility in enforcing the law. I would like to treat first the question, can the will of Congress in enacting legislation like the flammable fabric legislation, the sundry pieces of law that we have dealing with consumer deception, and things of this kind, disregard them because of budgetary shortages?

Is this something that they have a discretion to do? Aren't they supposed to carry out the law as written.

Mrs. ANGEVINE. It seems to me that the agency is committed to carry out the law as passed by Congress.

Mr. DINGELL. And isn't it a fact that failure so to do constitutes in effect a breach of responsibility, of trust?

Mrs. ANGEVINE. Certainly a breach of responsibility.

Mr. DINGELL. I am concerned about the fact that other intermediary agencies like the Bureau of the Budget should interpose budgetary questions between a question of carrying out the law and the allocation of financial resources. Do you have a comment on this matter?

Mrs. ANGEVINE. I am very concerned about the Bureau of the Budget, not only on that score, but on having so many industry committees on which they have no consumers representation, and to which they deny consumer representation. So you have hit a very sore point with me when you hit on the Bureau of the Budget. I think that we are in danger somewhat of having the most important segment of the Government become the Bureau of the Budget answerable to no one.

Mr. BERLIN. Mr. Chairman, you raise a very important point. It is a dilemma that has been bothering us for some time.

Let me give you one illustration.

Congress, as you know, passed the so-called Truth in Packaging Act. That act has gone virtually unimplemented. There are three agencies that have responsibility for its implementation, the Federal Trade Commission, the Food and Drug Administration, and the Commerce Department. The manpower allocations have varied from zero in one agency to a maximum of five in the most aggressive agency. We were thinking over this past year or so of trying to go to court on the theory that the consumers of this Nation were the beneficiaries of the congressional declaration of concern, and by God the agencies entrusted with the implementation of those policies have an obligation to those consumers to do what they should by way of implementation.

But as you well know, to try to sue the President, well that is not possible—the Budget Bureau, that is undoubtedly impossible—to sue the three agencies, they hide behind the fact that they have been blocked by the administration, by the Budget Bureau, by the White House—there is no effective way, as far as I can tell that the consumers can make sure that agencies are in fact implementing statutes passed for their benefit. And this is why Mrs. Angevine emphasized at the beginning of her statement that she hoped, we all hope, that in this the beginning of a new budget season, that the Congress will concern itself not only with funding levels, but with allocations of priorities. In one respect the Food and Drug Administration cannot be blamed for its lack of implementation of the fair packaging and labeling act, the truth in packaging act, because in its budget approval of a year ago, and I think of 2 years ago as well, the Congress in the appropriate committee reports specifically directed that agency not to concentrate any resources in the area of implementing truth in packaging.

Mr. DINGELL. Who did?

Mr. BERLIN. I am fairly certain that it was in the House Committee report.

Mr. DINGELL. The Appropriations Committee?

Mr. BERLIN. Committee.

Mr. DINGELL. I would be very interested in that.

MR. BERLIN. I will try to dig that out for you, Mr. Chairman.

MR. DINGELL. Mr. Oden.

MR. ODEN. Mrs. Angevine, I would like to touch once again on the Bureau of Textiles and Furs.

Mrs. ANGEVINE. Yes, sir.

MR. ODEN. We have discussed so far the Flammable Fabrics Act. Another question comes up regarding the Commission's investigators in the Bureau of Textiles and Furs. When they go out and make on-the-spot investigations, they not only check for flammable fabrics in the manufacturer's plant or in the department store selling the merchandise, they also check for correct labeling, or the fact that the article is labeled. With the technology today in manufacturing synthetic wearing material and wearing apparel, the question has been raised with regard to inspectors checking to make sure that a piece of wearing apparel is clearly labeled as to the content of the fabric, the washing procedures that must be followed, whether it must be dry-cleaned, washed in cold water or warm water, et cetera. In this regard, would you consider clear and conspicuous labeling of apparel to be trivia or something that the consumer today is extremely concerned about?

Mrs. ANGEVINE. We don't think it is trivia at all. As a matter of fact, we testified—CFA filed a statement—but a great many consumers came in from around the country and testified on this very thing just before Consumer Assembly in the middle of January. These FTC hearings are being continued, I believe, in March. And that is exactly the point that is being made by consumers. With the increasing number of different kinds of products that are manmade and that no one has experience handling—either cleaning or washing—it is imperative that labels be put on the garment itself so that you know what to do with it.

MR. ODEN. Would you consider it strange that at a time when the Commission has been attacked for not fulfilling its statutory mandates and not doing the job it should be doing for the consumers, that the one Bureau that appears to have, I guess one could say, the finest record of enforcement, that being the Bureau of Textiles and Furs, which in the last year made 10,000 inspections and issued over a hundred cease-and-desist orders against not only flammable fabrics but also false labeling of wearing apparel—wouldn't it seem strange to you that at a time when the Commission has been attacked for doing nothing, that at the same time critics of the Commission are going after the one Bureau that seems to have the best record in enforcement?

Mrs. ANGEVINE. Very strange.

MR. ODEN. No further questions.

MR. WERTHEIMER. Mr. Chairman.

MR. DINGELL. Mr. Wertheimer.

MR. WERTHEIMER. On that point, the ABA report of a study of the Federal Trade Commission made the following finding: That nearly 40 percent of total investigations opened at the FTC, and 50 percent of complaints filed at the Commission, involved the Bureau of Textiles and Furs. Now, when we talk about priorities, and we talk about the role that the Federal Trade Commission should be playing, doesn't this raise in your mind a question as to whether, in fact, there has

been an overemphasis at the Federal Trade Commission in terms of Bureau of Textiles and Furs activities.

Mrs. ANGEVINE. I don't feel that I really can answer that with any yes or no answer, because it may be that that is the only agency that was doing what it is we think all of them ought to do. And I would hate to say they weren't doing their job. They were. But what happens to the rest of them? Why were they not coming up to that same level? I wish I knew.

Mr. BERLIN. I would hope we would not tend to gage consumer problems by the volume of complaints received by the FTC. I suspect that the volume of complaints, which I consider rather low, might well be a result of a lack of consumer awareness of the availability of the FTC for the resolution of these complaints. I suggest this, because yesterday morning I heard Virginia Knaeuer North testify, and she pointed out that the FTC resolved 65 complaints last year in the area of deceptive trade practices, while her office in New York receives more than twice that number of complaints on a daily basis. I suspect that the FTC's complaint record may not be an accurate weather-vane of consumer concerns, because I am not quite sure that consumers have the confidence in the FTC to make known their concerns to that agency.

I think this is borne out by the fact that local agencies that have been more aggressive and have received more publicity for their activities in the consumer protection area are receiving a far greater volume of consumer inquiries and complaints than is the Commission.

Mr. WERTHEIMER. Let me read some of the testimony here by a man who was a member of the ABA study group, Ira Millstein. He said:

I think the most striking finding that the report referred to was the fact that in the area of false and deceptive advertising and retail fraud, for example, with which I am very familiar, working in the field, they had 12 lawyers, the Commission had 12 lawyers assigned to study spectacularly important projects, whereas they had a hundred people in personnel working on labeling.

Now, I certainly would agree that one can't criticize a bureau solely for doing what they are doing correctly if that is the case. However, we also have to deal with the reality of the situation here. The Federal Trade Commission has been subjected to a lot of criticism in terms of the priorities they have been using. I would imagine that they have been subjected to that same kind of criticism from your group.

Mrs. ANGEVINE. Very much.

Mr. WERTHEIMER. Within the limitations of the amounts of funds they are going to get then, don't we also have to look at the priorities they are carrying out at that time, and couldn't it very possibly be a legitimate function to try to turn around those priorities by changing personnel from one bureau to another?

Mrs. ANGEVINE. I would assume that—I would certainly hope that there is a total restudy of priorities all of the time. The Commission itself, with the administration supporting it, should try to develop rational priorities for this coming year. The Congress should see that the funds were available to carry out priorities that are reasonable. If it is necessary to cut some of them back, such a decision could be made. But I am not quite sure that it is.

Mr. BERLIN. No one will dispute the fact that with the existing budget limitations there will have to be a reassessment of priorities.

But I think we have to focus on those budget limitations for a moment. Here we are dealing with the sole agency of Government that today is supposed to be the consumer guardian. There is no other agency with comparable responsibility. I don't know the number of bills that are pending before both Houses of the Congress now to establish all sorts of consumer protection agencies but it is large, and God only knows when one will be passed. But we supposedly have one, a consumer protection agency now. And yet we are allocating to it slightly in excess of \$20 million out of a budget in excess of \$200 billion.

Mr. WERTHEIMER. Along these lines, wouldn't the \$6 million increase that the Federal Trade Commission originally asked for, in your opinion, be inadequate to meet the totality of responsibilities the FTC actually has.

Mrs. ANGEVINE. They asked for \$6 million.

Mr. BERLIN. That is correct.

Mr. WERTHEIMER. It would be 6 million more. But in terms of what you are talking about, you are advocating really a new appraisal of the budgetary requirements of the Federal Trade Commission in terms of the responsibilities they have in our society today, aren't you.

Mrs. ANGEVINE. Right.

Mr. BERLIN. We heartily endorse the notion that we need a new kind of consumer protection mechanism in the Federal Government. We are not at all convinced that the FTC alone should have that responsibility. But at least until that mechanism is developed by the Congress, let's at least give the only agency with any supposed dedication to consumer protection the resources necessary to do even a minimal job.

Mr. DINGELL. If the gentleman would yield, aren't you effectively saying that we ought to give the boy a suit that will fit rather than sawing off his arms and legs to fit what is obviously a hopelessly and inadequate suit.

Mr. BERLIN. That is a very good way to put it.

Mr. DINGELL. And don't we find ourselves in a rather awkward situation in trying to propose an obviously too thin budget at the Federal Trade Commission.

Mr. BERLIN. And of course a misfitting suit may well be deceptive labeling in itself.

Mr. DINGELL. And of course we find ourselves on the thoroughly unpleasant situation of listening to people recommend priorities that have not even gone into the question of what the FTC's budget is and what is adequate to carry out the problems assigned, isn't that correct?

Mr. BERLIN. That is correct.

That is, they proceed on the premise that the existing funding levels, perhaps with some minimal increase, are appropriate.

Mr. DINGELL. When in fact we find ourselves confronted with the situation that probably the FTC needs more money in addition to a possible review of its priorities and a reexamination of its responsibilities, but definitely more money to carry out the responsibilities to which Congress has assigned it?

Mr. BERLIN. That is absolutely right.

Mr. DINGELL. Thank you very much, Mrs. Angevine.

We are always glad to see you and renew friendships that we value. Mr. Berlin, we also are glad to see you. And thank you for the time you have given us.

The next witness is Mr. Stewart W. Pierce.

As you take your seat, Mr. Pierce, would you give our reporter your full name and address so that we may identify you for the purpose of the record?

TESTIMONY OF STEWART W. PIERCE, RICHMOND, VA.

Mr. PIERCE. My name is Stewart W. Pierce. My address is 25 Libbie Avenue, Richmond, Va.

Mr. Chairman, and committee members, I appreciate your invitation with its opportunity to appear before this committee, as an individual citizen and consumer. I propose to present certain facts and comments on the delivered pricing practices in the tobacco industry and related matters which, hopefully, will be of interest to the committee.

To the extent that delivered pricing may be challenged as anticompetitive or as a continuing economic injustice in this or any industry, I urge your action through new legislation or, as in the case of tobacco, by insistence upon antitrust enforcement.

In 1948 the House Small Business Committee issued a report on monopolistic and unfair trade practices. In that report, the failure to achieve any public benefit from the Supreme Court tobacco antitrust decision (1946) and the potential of delivered pricing as a device of monopoly power were treated as two separate subjects.

In the following section (section A), it is demonstrated that delivered pricing is a key factor in the past and present operation of the cigarette industry.

Mr. Chairman, this outline supports the conclusion that the unchanged 80-year-old delivered pricing practice in that industry, enforced by refusal to sell f.o.b. origin, was and is an antitrust violation.

This section covers the delivered pricing practice in the cigarette industry from 1890 to 1970, with particular emphasis on the refusal to sell f.o.b. origin:

(1) In 1890, a new form of delivered pricing (freight allowed; or f.o.b. origin, freight prepaid) was adopted in conjunction with the formation of the American Tobacco Co., as a holding company. This practice continues unchanged in use by all cigarette companies today. Under single zone delivered pricing, the prices of the manufacturers are "uniform"—the same—at all destinations in the continental United States, Alaska, and Hawaii.

(2) During the First World War, the Federal Government tried, unsuccessfully, to purchase cigarettes on a straight f.o.b. origin basis. Again without success, the Government then tried to recover moneys in excess of transportation charges actually paid by the manufacturers, primarily on shipments to the Armed Forces. As recently as 1965, the companies were refusing to sell to the Government on a bona fide f.o.b. origin basis—by quoting "the same price on basis of f.o.b. origin as they do on f.o.b. destination."

(3) In 1944, a Federal Circuit Court noted the "uniformity" of cigarette prices (as between destinations), as well as "identical list

prices"—as between the individual companies. The same court described the pricing practices of the major companies in these words: "Such list prices, upon which the whole price policy of the manufacturers is based, are entirely arbitrary and are justified on no economic ground."

Although this antitrust conviction was affirmed by the landmark Supreme Court decision of 1946, the Department of Justice has never followed through to end the practices which led to this conviction, a state of affairs described as "inexplicable and indefensible."

Even though the exact transportation cost is not known—except to the companies themselves—it is clear that this factor is not insignificant. For example, in 1951, a major manufacturer viewed with alarm the proposed 5 percent increase in transportation rates by a single mode to a single geographical area.

On the other hand, the cigarette companies were "rewarded" with a windfall—of an unknown amount—when the 3 percent Federal transportation tax was repealed in 1959. This repeal reduced the transportation cost paid by the manufacturers—by a factor 60 percent of that represented by the proposed freight increase—which had caused such alarm. Delivered prices were not reduced, nor were direct-list purchasers given the opportunity to buy f.o.b. origin and thus benefit from repeal of the transportation tax.

Mr. Chairman, the next section outlines the delivered pricing practices in several major industries, once again emphasizing the refusal to sell f.o.b. origin. I would like to make a brief statement concerning these cases, and let the details be shown in the record subject to any clarification, by questions, that might be necessary.

The 1955 report of the Attorney General's Committee to Study the Antitrust Laws provides us with this insight to delivered pricing: "Where sellers desire to suppress price competition, a strictly enforced compulsory 'delivered' pricing formula among all industry members can materially contribute to success."

Refusal of all industry members to sell f.o.b. origin has been the singular factor in the "enforcement" of delivered pricing practices when held to be unlawful. Major examples have involved the sugar, cement, steel, electrical equipment, and tire industries.

The details relative to these cases are outlined in my statement, and I would like to submit them for the record.

Mr. DINGELL. Without objection it is so ordered.

Mr. PERCE. The next section relates to an advisory opinion of the Federal Trade Commission, with an effort to correlate it to the delivered pricing practices in the cigarette industry.

In October, 1967, the Commission released an advisory opinion, involving delivered pricing, which is both "eyebrow raising" and perplexing from a consumer point of view. Apparently the Commission, in its concern with price discrimination under the Robinson-Patman Act, was willing to ignore the countervailing interest of the purchaser (in performing his own pickup and transportation), or to regard that interest as a necessary sacrifice—"a necessary result of using a delivered pricing system."

Significantly, the opinion does not clarify whether this practice was limited to the single food manufacturer, or was industrywide. In any event, the question must be raised as to be wasteful and infla-

tional impact on purchases in our total economy—without the alternative of f.o.b. origin purchase.

The economic roles and functions treated in this advisory opinion can be segmented as follows:

- (1) manufacture/seller sector;
- (2) movement/transportation sector;
- (3) wholesale or retail/purchaser sector.

In this and other instances, the seller and purchaser each have primary decision-making roles in their respective sectors. What of the middle and interconnecting sector—the transportation of goods from the manufacturer's production or warehouse source?

Mr. Chairman, I respectfully suggest that the consumer—"the ultimate user of the product being transported"—has a vital interest and concern that the economic functions and benefits of this sector are fully and fairly utilized.

Except when arbitrarily and unilaterally controlled, the variable terms of sale and purchase should permit the function of transportation to be provided—

- (a) by the seller—through use of his own transportation equipment, or
- (b) by the purchaser—through use of his own transportation equipment, or
- (c) by either the seller or purchaser—through arrangement and payment for the transportation services of a third party, usually independent of both.

In the situation before the Commission, this seller chose not to play any role in the transportation sector by use of his own equipment; but chose, instead, a role of "purchaser" of the necessary transportation services from a third party—identified as a "common carrier." Under the proposed terms, not approved by the Commission, the purchaser would have made use of his own transportation equipment; with the seller still having access to "common carriers" on other shipments. This burning question must be asked: would the seller have been willing (and the Commission permissive) for the purchaser to buy his goods f.o.b. shipping point with access to the "common carrier" for movement to destination?

It is important to recognize that these "common carrier" transportation services involve the function of a dynamic and innovative industry operating in the quasi-public sector of our national economy under extensive regulation in the public interest.

Mr. Chairman, are the antitrust laws truly a "charter of economic freedom"; should we attempt to avoid "a degree of centralized private decision-making that is incompatible with a free enterprise system"; will "consumerism" demand in this decade that the public interest features of the common carrier industry "be promoted to an extent and in a manner different from those of the sixties"; and should "a major function of Government—perhaps the major domestic function of Government"—be directed with urgency toward the full development of the countervailing power of purchasers and consumers?

If we give affirmation to these principles (as I suggest we must), can we fail to protect and give assurance to the purchaser in his rightful role in the transportation sector? For example, should we not

prohibit a seller, under industrywide delivered pricing, from fore-stalling a purchaser in the use of his own transportation equipment; or restraining a purchaser from access to and use of the transportation services offered to the public by the common carrier industry?

Mr. Chairman, there is an urgency in the need to speak out now, and specifically, concerning the delivered pricing practices of the cigarette industry. We are fast approaching the point-of-no-return; the point in time when the inertia and lack-of-will of responsible agencies of our Government will have immortalized this classic and long-standing injustice; a violation of more than our economic law and order alone.

In conclusion, I respectfully urge this committee to renew and persist in its expressed concern of 1948, and to insure action—at long last—through insistence upon enforcement or by legislative change, if the latter proves necessary.

Mr. Chairman, I thank you very much.
(The statement follows:)

STATEMENT OF STEWART W. PIERCE, RICHMOND, VA.

Mr. Chairman, I appreciate your invitation with its opportunity to appear before this Committee, as an individual citizen and consumer. I propose to present certain facts and comments on the delivered pricing practices in the tobacco industry and related matters which, hopefully, will be of interest to the Committee.

To the extent that delivered pricing may be challenged as anticompetitive or as a continuing economic injustice in this or any industry, I urge your action through new legislation or, as in the case of tobacco, by insistence upon antitrust enforcement.

In 1948 the House Small Business Committee issued a report on monopolistic and unfair trade practices. In that report, the failure to achieve any public benefit from the Supreme Court tobacco antitrust decision (1946) and the potential of delivered pricing as a device of monopoly power were treated as two separate subjects.¹

In the following section (Section A), it is demonstrated that delivered pricing is a key factor in the past and present operation of the cigarette industry.

Mr. Chairman, this outline supports the conclusion that the unchanged/80-year-old delivered pricing practice in that industry, enforced by refusal to sell f.o.b. origin, was and is an antitrust violation.

A. DELIVERED PRICING PRACTICE IN THE CIGARETTE INDUSTRY (1890-1970), ENFORCED BY REFUSAL TO SELL F.O.B. ORIGIN

(1) In 1890, a new form of delivered pricing (freight allowed; or f.o.b. origin, freight prepaid) was adopted in conjunction with the formation of the American Tobacco Company, as a holding company.² This practice continues unchanged in use by all cigarette companies today. Under single-zone delivered pricing, the prices of the manufacturers are "uniform"—the same—at all destinations in the continental United States, Alaska and Hawaii.

(2) During the First World War, the Federal Government tried, unsuccessfully, to purchase cigarettes on a straight f.o.b. origin basis. Again without success, the Government then tried to recover monies in excess of transportation charges actually paid by the manufacturers, primarily on shipments to the

¹ U.S. Congress, House, Select Committee on Small Business, *Monopolistic and Unfair Trade Practices*, 80th Cong., 2d session, 1948, H. Rept. 2465, pp. 10, 23; and John Kenneth Galbraith, *American Capitalism—The Concept of Countervailing Power*, 1952, p. 56-57. NOTE.—My special appreciation is due Professor Galbraith for having "addressed this book to the layman. . ." Foreword—p. viii.

² Vernon A. Mund, *Business and Government*, 1965, p. 243; and U.S. Industrial Commission, *Hearings*, May 9, 1901—testimony of James B. Duke. (During Senate committee hearings in 1948, Dr. Mund identified "delivered pricing" as a device of monopoly power. *New York Times*, Dec. 9, 1948.)

armed forces.³ As recently as 1965, the companies were refusing to sell to the Government on a *bona fide f.o.b. origin* basis—by quoting “the same price on basis of f.o.b. origin as they do on f.o.b. destination.”⁴

(3) In 1944, a Federal Circuit Court noted the “uniformity” of cigarette prices (as between destinations), as well as “identical list prices” (as between the individual companies).⁵ The same court described the pricing practices of the major companies as follows: “Such list prices, upon which the whole price policy of the manufacturers is based, are entirely arbitrary and are justified on no economic ground.”⁶

Although this antitrust conviction was affirmed by the landmark Supreme Court decision of 1946, the Department of Justice has never followed through to end the practices which led to this conviction, a state of affairs described as “inexplicable and indefensible.”⁷

Even though the exact transportation cost is not known (except to the companies themselves) it is clear that this factor is not insignificant. For example, in 1951, a major manufacturer viewed with alarm the proposed five (5) percent increase in transportation rates by a single mode to a single geographical area.⁸

On the other hand, the cigarette companies were “rewarded” with a windfall (of an unknown amount) when the three (3) percent Federal transportation tax was repealed in 1959. This repeal reduced the transportation cost paid by the manufacturers—by a factor 60 percent of that represented by the proposed freight increase (which had caused such alarm). Delivered prices were not reduced, nor were direct-list purchasers given the opportunity to buy f.o.b. origin and thus benefit from repeal of the tax.

B. DELIVERED PRICING PRACTICES OF MAJOR INDUSTRIES, ALSO INVOLVING THE REFUSAL TO SELL F.O.B. ORIGIN

The 1955 report of the Attorney General's Committee to Study the Antitrust Laws provides us with this insight to delivered pricing: “Where sellers desire to suppress price competition, a strictly enforced compulsory ‘delivered’ pricing formula among all industry members can materially contribute to success.”⁹

Refusal of all industry members to sell f.o.b. origin has been the singular factor in the “enforcement” of delivered pricing practices when held to be unlawful. Major examples (outlined below) have involved the sugar, cement, steel, electrical equipment and tire industries.

Sugar: Concerted maintenance by sugar refiners of an arbitrary delivered price system which bore no reasonable relation to actual cost of shipping sugar, and their refusal to sell f.o.b. refinery, constituted unreasonable restraint of trade.¹⁰

Cement: The Federal Trade Commission consent decree in the Cement Institute case specifically required sale on a f.o.b. origin basis if requested by the purchaser. This case originated from identical delivered bids on Government pur-

³ See 13 F. Supp. 425 (1936) for outline of U.S. Court of Claims cases (1923-25): example—on an original billing for \$4,329,447.29 the Government attempted recovery of \$377,648.48. It should be noted that this unsuccessful effort was clearly before the first of the long line of decisions condemning mandatory delivered pricing as an element of monopoly and price-fixing. See Section B of this outline.

⁴ Letter from Asst. Atty. General, Antitrust Div., Dept. of Justice, to Staff Director/General Counsel, Select Committee on Small Business, U.S. Senate, Mar. 12, 1965; and Galbraith, *op. cit.*, p. 127: “There are producers of consumers' goods who have secured themselves from exercise of countervailing power. . . . It seems probable that in a few industries, tobacco manufacture for example, the members are strong enough and have sufficient solidarity to withstand any pressure applied to them even by the most powerful buyer.”

⁵ Fritz Machlup, *The Basing-point System*, 1949, p. 5 (footnote): “Delivered prices are both uniform and identical if all sellers charge one and the same price for their products delivered to *any buyer* in the country.” (Underlining added.)

⁶ 147 Fed. 2d 93, 113 (1944); affirmed 328 U.S. 781 (June 10, 1946).

⁷ *The Sunday Star*, Feb. 9, 1969: “1946 Antitrust Conviction Still Remains Unenforced”; *the Evening Star*, Feb. 13, 1969: “Dingell Asks Action in Tobacco Trust Case”; *the Evening Star*, Mar. 11, 1969: “U.S. Is Re-Examining Tobacco Antitrust Case”.

⁸ Interstate Commerce Commission, *I & S Docket 5666* (1951), 281 ICC 127, 141:

“American, for example, asserted that rates based on 55 percent of first class would increase its annual transportation costs by about \$400,000; that such increase might result in decentralization of production, in the abandonment of warehouse facilities at the various destinations, or in the use of private or contract carriers; and that these factors must necessarily be considered in the prescription of minimum rates.”

⁹ Report of the Attorney General's National Committee to Study the Antitrust Laws, Mar. 31, 1955, p. 214.

¹⁰ 15 Fed. Supp. 817; 297 U.S. 553 (1936).

chases in the Southwest, with refusal to sell to the Government on a bona fide f.o.b. origin basis. A common practice had prevailed in the cement industry to quote the same price on the basis of f.o.b. origin as they did on f.o.b. destination.¹¹

Steel: In the settlement of the steel case (1951), the steel companies were prohibited from continuing their common course of action in "failing to quote or to sell and deliver soy steel products f.o.b. at the plant of manufacture thereof."¹²

Electrical equipment: "One thread ran thru the entire sampling"—thus did a news item spotlight for the first time the key factor of "identical delivered prices" found in a sampling of bids opened by the Tennessee Valley Authority in 1959. From this origin developed the famous electrical price-fixing case, finally settled by award of antitrust damages of historic proportions.¹³

Tires: In 1962, the Federal Trade Commission issued a consent order halting a price-fixing conspiracy by fourteen tire and tube manufacturers, accounting for substantially all of the industry's domestic production. Key provisions of the order were that each manufacturer must abandon its existing prices, and independently establish new ones. The complaint had alleged that the manufacturers had adopted and maintained a single zone delivered price system for tires and tubes. Under this system, the prices quoted by the "Big Four" to all customers of a class throughout the United States, regardless of location and differing freight rates/costs, were identical or substantially matched.¹⁴

C. REVIEW OF FEDERAL TRADE COMMISSION ADVISORY OPINION (1967)¹⁵ WITH CORRELATION TO DELIVERED PRICING PRACTICES IN THE CIGARETTE INDUSTRY

In October, 1967, the Commission released an advisory opinion, involving delivered pricing, which is both "eye-brow raising"¹⁶ and perplexing from a consumer point of view. Apparently the Commission, in its concern with price discrimination under the Robinson-Patman Act, was willing to ignore the countervailing interest of the *purchaser* (in performing his own pickup and transportation), or to regard that interest as a necessary sacrifice—"a necessary result of using a delivered pricing system."

Significantly, the opinion does not clarify whether this practice was limited to the single food manufacturer, or was industry-wide. In any event, the question must be raised as to the wasteful and inflationary impact on purchases in our total economy—without the alternative of f.o.b. origin purchase.

The economic roles and functions involved in this opinion can be segmented as follows:

1. manufacturer/*seller* sector
2. movement/*transportation* sector
3. wholesale or retail/*purchaser* sector

In this and other instances, the *seller* and *purchaser* each have primary decision-making roles in their respective sectors. What of the middle and interconnecting sector—the transportation of goods from the manufacturer's production or warehouse source?

Mr. Chairman, I respectfully suggest that the consumer—"the ultimate user of the product being transported"¹⁷—has a vital interest and concern that the economic functions and benefits of this sector are fully and fairly utilized.

Except when arbitrarily and unilaterally controlled, the variable terms of sale and purchase should permit the function of transportation to be provided:

- a. by the *seller*—through use of his own transportation equipment, or
- b. by the *purchaser*—through use of his own transportation equipment, or
- c. by either the *seller* or *purchaser*—through arrangement and payment for the transportation services of a third party, usually independent of both.¹⁸

¹¹ 333 U.S. 683 (1948).

¹² Federal Trade Commission, *Order, Docket No. 5508*, Aug. 10, 1951.

¹³ *The Washington Daily News*, May 20, 1959, p. 12: "Records Show 47 Firms Have Given TVA Identical Bids." In addition to electrical goods, 14 other classes of equipment and material were involved.

¹⁴ Federal Trade Commission, *News Release, Consent Order 7505*, Jan. 11, 1962.

NOTE.—For significance and effect of willingness of seller to quote f.o.b. origin—see 268 U.S. 563 (1925): Based on evidence that "the defendants quote and sell on an f.o.b. mill basis when so requested," the members of the Maple Floor Mfrs. Assn. were held not to be engaged in unlawful restraint of trade.

¹⁵ Federal Trade Commission, *Advisory Opinion Digest No. 147*, Oct. 24, 1967.

¹⁶ *Traffic Management*, April 1968 (p. 15): "FTC Questions Some Shipper Practices".

¹⁷ *Traffic Management*, December 1969 (p. 17): "'Consumerism' Reaches Transport Regulatory Agencies".

¹⁸ See *Traffic Management*, December 1968 (pp. 45-50), for description of the distribution system of a major cigarette manufacturer, involving use of common carriers.

In the situation before the Commission, this *seller* chose not to play any role in the transportation sector by use of his own equipment; but chose, instead, a role of "purchaser" of the necessary transportation services from a third party—identified as a "common carrier." Under the proposed terms, *not approved* by the Commission, the *purchaser* would have made use of his own transportation equipment; with the *seller* still having access to "common carriers" on other shipments.¹⁹ This burning question must be asked: Would the *seller* have been willing (and the Commission permissive) for the *purchaser* to buy his goods f.o.b. shipping point with access to the "common carrier" for movement to destination?

These "common carrier" transportation services involve the function of a dynamic and innovative industry operating in the quasi-public sector of our national economy under extensive regulation in the public interest.

Mr. Chairman, are the antitrust laws truly a "charter of economic freedom";²⁰ should we attempt to avoid "a degree of centralized decision-making that is incompatible with a free enterprise system";²¹ will "consumerism" demand in this decade that the public interest features of the common-carrier industry "be promoted to an extent and in a manner different from those of the sixties";²² should "a major function of government—perhaps *the* major domestic function of government"—²³—be directed with urgency toward the full development of the countervailing power of purchasers and consumers?

If we give affirmation to these principles (as I suggest we must), can we fail to protect and give assurance to the *purchaser* in his rightful role in the transportation sector? For example, should we not prohibit a *seller*, under industry-wide delivered pricing, from:

forestalling a *purchaser* in the use of his transportation equipment²⁴

or

restraining a *purchaser* from access to and use of the transportation services offered to the public by the common-carrier industry?

Mr. Chairman, there is an urgency in the need to speak out now, and specifically, concerning the delivered pricing practices of the cigarette industry. We are fast approaching the point-of-no-return; the point in time when the inertia and lack-of-will of responsible agencies of our Government will have immortalized this classic and long-standing injustice, a violation of more than our economic law and order alone.²⁵

In conclusion, I respectfully urge this Committee to renew and persist in its expressed concern of 1948, and to insure action—at long last—through insistence upon enforcement by legislative change, if the latter proves necessary.

Mr. DINGELL. Mr. Pierce, the Chair wishes to commend you for a very fine statement, and for your long interest in this matter. You have recalled to me some correspondence that I have had between myself and the Department of Justice with regard to the subject matter of your statement, a matter which I intend to pursue and to enter into with renewed vigor when we have the Department of Justice before this committee for an appropriate appearance at a time very soon.

¹⁹ *Seventh Annual Report*, Select Committee on Small Business, U.S. Senate, Rept. No. 46, 85th Congress, 1957, p. 49.

²⁰ *Economic Report on Corporate Mergers* (Staff Report to the FTC) Nov. 3, 1969, p. 5. See page 678 of this Report for listing of the R. J. Reynolds/Sea-Land merger, 1969. For other examples of the interdependence of common carriers and large shipper organizations, see *Traffic Management*, May 1969, p. 46; and December 1969, p. 68.

²¹ *Transport Topics*, Nov. 24, 1969 (p. 9): "Stafford Sees 'Consumerism' As Top Factor in ICC Decisions".

²² Galbraith, *op. cit.*, p. 133; and *New York Times*, Dec. 29, 1969 (p. 46): "Galbraith Assails 'Consumer Is Sovereign' Assumption".

²³ By the same token, it would seem proper to recognize and permit the prior position and self-interest of the *seller* to sell on a delivered price *only*, provided that his own transportation equipment was to be the means of delivery/transportation.

²⁴ *New York Times*, Aug. 11, 1967 (p. 38): "To the extent that our laws and commercial customs have been rigged in favor of the seller and against the consumer, to that extent they have perpetuated an alienation of the people—a loss of conviction that they could work through the orderly processes of government and law." (Testimony—Rev. Robert J. McEwen, S.J., Chairman, Dept. of Economics, Boston College, hearings of Subcommittee on Consumer Affairs, Committee on Banking and Currency, House of Representatives, Aug. 7-11, 1967, p. 363).

Mr. Potvin.

MR. POTVIN. Mr. Pierce, several days ago the spokesman for the National Tobacco Dealers appeared before us and confirmed in all respects, I should say, that what you state is correct, that it costs the wholesaler when he purchases for resale from the cigarette manufacturer the same price, whether he be in Los Angeles or in Miami or apparently—I had not realized that—in Honolulu or Anchorage. Is that literally correct.

MR. PIERCE. Yes, sir, as I understand it. And certainly the information I have confirms it.

MR. POTVIN. Is it not correct also, sir, that the cigarette manufacturers tend to have common warehousing in various cities around the country?

MR. PIERCE. One of my notes, Mr. Counsel, which I would refer to here—note 18—identifies an article in Traffic Management magazine that is a very good description of the distribution and transportation system of one of the major tobacco manufacturers.

MR. POTVIN. Could you submit that for the record, sir?

MR. PIERCE. Yes, I will submit the references, of course, and then copies of the article itself.

MR. POTVIN. I think that would be useful.

MR. PIERCE. In reading that article it is difficult to come to any other conclusion, in my judgment, than that which you have indicated; there seems to be a common purpose in their warehousing and in their distribution plan in its physical sense.

MR. POTVIN. Now, we have established that American Tobacco, L'Orillard, and others have their products residing in the same warehouse. In getting there from Richmond or North Carolina, as the case may be, do they habitually utilize consolidated shipments in which the products of more than one manufacturer would receive the benefit, through the combining or consolidating, of lower rates because of car-load lots, and so forth?

MR. PIERCE. This does not appear to be the case from the description given in this article. The common effort, if there be one, seems to initiate at the warehouse at a destination to which there would be independent type of movement from the manufacturers. However, from a field warehouse to a customer, the article indicates that there certainly is advantage in consolidated shipments, with strong indication in the article that that is actually the case; but not from the point of manufacture itself, sir.

MR. POTVIN. I am afraid I misconstrued one of your footnotes, Mr. Pierce, for which my apology. You are referring to consolidated in-bound shipments?

MR. PIERCE. That is right, sir. The article seems to indicate, if you put some other things to it, that there is an effort to arrange for an origin-to-destination consolidation on items coming into the tobacco manufacturer, and to another manufacturer in the same place, on an in-bound consolidated basis.

MR. POTVIN. Thus the "consolidated in-bound shipments" would not be the shipments from the factory to the warehouses but rather of inputs, paper, that type of thing, to the manufacturers?

Mr. PIERCE. That is right, supplies to the manufacturers. This seems to me to be a reasonable reading of the article. Beyond that I have no information.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Pierce, are you aware of the reasoning behind the manufacturers using the point of destination in determining cost?

Mr. PIERCE. This practice to me, as the court said, has no reason. It has an origin, it has a genesis. It was 80 years ago, the same year that the first antitrust laws were enacted.

Mr. ODEN. Of course, as you mentioned in your statement, the ICC in the last 15 years has lowered certain freight rates which the manufacturers have not passed on to the purchasers at destination, is that correct?

Mr. PIERCE. In the case of the transportation tax—this was very clear, this was a Government act, literally taking off 3 percent of the transportation charge.

Mr. ODEN. I am trying to understand exactly why they would do this. Certainly it would be more than just a historical trade practice.

Mr. PIERCE. Well, they do it, I suggest for the consideration of the committee, for the very reason that the report of the Attorney General's committee in 1955 says that people do these things. And I read it again:

Where sellers desire to suppress price competition a strictly enforced compulsory delivered pricing formula among all industry members can materially contribute to success.

It has been successful, it has been successful for a long time.

Mr. ODEN. I can understand suppressing price competition, but it also appears that there is a profit in the manufacturer not allowing f.o.b. price.

Mr. PIERCE. Well, Professor Munn, an eminent authority, says that this isn't just simply a matter of averaging out transportation costs. He has clearly indicated that the delivered price covers not only the transportation cost, but also it includes a monopoly factor. It is a practice which benefits them beyond just the pure transportation aspects. This has been established by Professor Munn.

Mr. ODEN. Thank you. I have no further questions.

Mr. DINGELL. Mr. Pierce, the committee wishes to commend you for a very fine statement, and for a great deal of careful thought that has gone into it. And we are most appreciative of your presence this morning.

Thank you very much.

The Chair notes that Mr. Watson Rogers, president, Food Brokers Association, was scheduled to be heard this morning, but that unfortunately he is unable to be with us at this time. The Chair will, therefore, afford Mr. Rogers opportunity either to be heard at a time later or to submit such statement as he deems appropriate to the committee for the purposes of the record.

Mr. DINGELL. Our next witness is Mr. Robert C. Brooks, Jr., professor, Department of Economics, Vanderbilt University.

Professor, we are most privileged that you can be with us. It is a privilege to welcome you, Professor Brooks, for such statement as you choose to give.

TESTIMONY OF PROF. ROBERT C. BROOKS, JR.¹ VANDERBILT UNIVERSITY

Mr. BROOKS. Well, it is a privilege to be here, and I certainly appreciate your asking me to talk with you about this.

I have prepared a statement, and I have also written up about 30 pages of additions to the statement which go into a lot of these questions in detail. And if you could accept them into the record as if read, then I have a few notes that I made on the way here that I would like to give.

Mr. DINGELL. This would be very helpful. Without objection, then, your statement and the supporting matters to which you alluded will be inserted in the record in full. And without objection they will be inserted as if given in detail.

And the Chair will be most pleased to recognize you for such other comments as you would like to make.

Mr. POTVIN. Mr. Brooks, that would be your statement which you have entitled "Additions to the Statement." Is it your wish that the excerpts from the University of Pennsylvania Law Review article and the article written by you also entitled "How Can Government Best Promote an Effective Market System" appear at the end of your remarks?

¹ CURRICULUM VITAE, Revised March 1969

Name: Robert C. Brooks, Jr.

Date and Place of Birth: March 27, 1927, Atlanta, Georgia.

Marital Status: Married.

Children: Three.

Education: A.B., with Honors, University of Chicago, 1944-46. M.B.A., University of Chicago, 1948-51. Ph. D., Graduate School of Business, University of Chicago, 1960. (Ford Foundation Doctoral Dissertation Fellow, 1958-59.)

Thesis Title: "The Meaning and Determination of 'Injury to Competition' Under the Robinson-Patman Act."

Fields of Concentration: Economics of Business Firms, Statistical Inference, Marketing Management, Sociology.

Teaching Experience: Instructor, Tokyo Army College, 1947; Instructor, Georgia Institute of Technology, 1951; Assistant Professor of Marketing, University of Georgia, 1954-58; Assistant Professor of Business Administration, Vanderbilt University, 1959-62; Associate Professor of Business Administration, Vanderbilt University 1962-66; Professor of Business Administration, Vanderbilt University, 1966-.

Other Professional Experience: Market Analyst, Market Research Department, Reynolds Metals Co., 1952-54 (A list of my studies of various markets for aluminum is available. The studies themselves were restricted for use only within the company.). Participant in Danforth Seminar on Religion and Ethics in Business, Harvard Business School, July, 1959. Participant in Forum on Finance, New York University, June, 1960. Presented paper at meetings of American Marketing Association, 1961. Expert Witness (Federal Court) on Classification of Sales as Retail or Wholesale, 1962. (Consultant on appeal to Supreme Court, 1965.) Participant in seminar on The Economics of Regulated Public Utilities, University of Chicago, June 1963. Participant in Research Workshop in Marketing, University of California, Berkeley, July-August, 1963. Discussant of a paper read at meetings of Southern Economic Association, 1963. Member, Board of Advisors, Southern Marketing Association, 1963-64. Political opinion research consultant for congressional campaigns, 1962-. Consultant to business, advertising, publishing, and law firms, 1962-. Member, Board of Directors, Vanderbilt Credit Union, 1966-. Consultant, Bureau of Economics, Federal Trade Commission, 1967-. Presented paper at meetings of Southern Economic Association, 1967. Panel Discussant on "Marketing and the Federal Trade Commission" at meetings of American Marketing Association, 1967. Participant and Session Leader, Seminar on Consumer Problems, Vanderbilt Law School, 1969.

Memberships: American Economic Association; Sales & Marketing Executives of Nashville.

Publications: See attached list.

Business Address: Department of Economics and Business Administration, Vanderbilt University, Nashville, Tenn.

Publications by Robert C. Brooks, Jr., March 31, 1969

1. "Personality Tests and the Selection of Salesmen," *Georgia Business*, Vol. XV (October 1955), pp. 1-5.
2. "'Word-of-Mouth' Advertising in Selling New Products," *Journal of Marketing*, Vol. 22 (October, 1957), pp. 154-161.

Mr. Brooks. We have the basic statement and then the additions to the statement.

I do note that one of them refers to the article, "How Can Government Best Promote an Effective Market System," which deals basically with the question of the use of conduct approaches as opposed to structure approaches.

3. "A Recent Example of the Regression Fallacy," *Journal of Marketing*, Vol. 23 (July, 1958), p. 64.
4. "Does Low Market Occupancy Indicate the Absence of Monopoly Power?" *Antitrust Bulletin*, Vol. IV (July-August, 1959), pp. 579-582.
5. Review of *Can Capitalism Compete?* by Raymond Miller, *Journal of Marketing*, Vol. 24 (October, 1959), pp. 129-130.
6. "Volume Discounts as Barriers to Entry and Access," *Journal of Political Economy* Vol. LXIX (February, 1961), pp. 63-69.
7. "Injury to Competition Under the Robinson-Patman Act," *University of Pennsylvania Law Review*, Vol. 109 (April, 1961), pp. 777-832.
8. "Businessmen's Concepts of Injury to Competition," *California Management Review*, Vol. III (Summer, 1961), pp. 89-101.
9. "Price Cutting and Monopoly Power," *Journal of Marketing*, Vol. 25 (July, 1961), pp. 44-49.
10. Digest of (8), above, in *The Executive*, published by Harvard Business School, Vol. 5 (November, 1961), pp. 27-30.
11. Reprint of (8), above, in *Antitrust Bulletin*, Vol. VI (December, 1961), pp. 569-590.
12. "Economic Bases for Findings of 'Injury' Under the Robinson-Patman Act," in *The Social Responsibilities of Marketing*, Chicago: American Marketing Association, 1962, pp. 81-85.
13. "Why Work?—A Christian Answer," *Christian Herald*, Vol. 85 (September, 1962), pp. 12-14.
14. Reprint of (9), above, in *Readings in Marketing*, Columbus, Ohio: Charles E. Merrill, 1963, pp. 535-543.
15. "Relating the Selling Effort to Patterns of Purchase Behavior," *Business Topics*, Vol. 11 (Winter, 1963), pp. 73-79.
16. *Sources of Information about Homes for Sale*, a report to the Home Builders Association of Tennessee, 1964.
17. *Nashville FM Grows Up*, an audience survey for the FM Broadcasters of Nashville, 1964.
18. "A Neglected Approach to Ethical Business Behavior," *The Journal of Business* (University of Chicago), Vol. XXXVII, No. 2 (April, 1964), pp. 192-194.
19. "Alternative Approaches to Education for Business Administration," in *Proceedings of the Annual Conference*, Roanoke, Virginia: Southern Marketing Association, 1964, pp. 58-62.
20. Reprint of (5), above, in *Readings in Promotion Management*, New York: Appleton-Century-Crofts, 1965, pp. 23-30.
21. Review of *The Robinson-Patman Act: Summary and Comment* by Daniel Jay Baum, *The Journal of Business* (University of Chicago), Vol. XXXVIII, No. 4 (October, 1965), pp. 433-434.
22. *Influences of Television Antenna Choice in Problem Reception Areas*, a report for the Maximum Service Telecasters Association, 1965.
23. "The Anheuser-Busch Case," in *New Research in Marketing*, Lee E. Preston, ed., Berkeley, California: Institute of Business and Economic Research University of California, 1966, pp. 70-82.
24. "Buying Habits," in *Consumer Survey of Nashville Market*, Nashville, Tennessee: WSM Television, 1966, pp. 4-7.
25. "Design of Sample for National Survey," in *A National Sample of the Methodist Church*, Nashville, Tennessee: Central Research, Methodist Publishing House, 1967, pp. 5-10.
26. Reprint of (8), above, in *Social Issues in Marketing*, Lee E. Preston, ed., Glenview, Ill.: Scott Foresman, 1968, pp. 168-179.
27. Reprint of (6), above, in *Readings in the Regulation of Business*, Sidney M. Blumner & Dennis L. Hefner, eds., Scranton, Pa.: International, 1968, pp. 78-87.
28. Reprint of (15), above, in *Readings in Sales Force Management*, Kenneth R. Davis and Frederick E. Webster, Jr., eds., New York: Ronald, 1968, pp. 203-210.
29. *Tennessee Products Plant Re-Use Survey* (with Robert N. Moore), Washington: Economic Development Administration, 1968, pp. 77 + xiii.
30. "How Can Government Best Promote an Effective Market System?" in *Money, the Market and the State*, Nicholas Beadles and Aubrey Drewry, eds., Athens, Ga.: University of Georgia Press, 1968, pp. 208-225.
31. *Efficient Capacity in the Color TV Picture Tube Industry Relative to Present and Future Demand*, report to Office of Business Development, U.S. Department of Commerce, 1968, p. 9.
32. Reprint of (8), above, in *Marketing Strategy: Contemporary Approaches*, Ronald D. Michman, ed., D. C. Heath Co. (forthcoming).
33. Review of *Antitrust Economics: Selected Legal Cases and Economic Models*, by Eugene M. Singer, *Antitrust Bulletin*. (forthcoming)
34. Reprint of (15), above, in *Marketing Strategy: Contemporary Approaches*, Ronald D. Michman, ed., D. C. Health Co. (forthcoming)
35. Reprint of (15), above, in *The Environment of Business*, James H. Bearden, ed., Holt, Rinehart and Winston. (forthcoming)
36. Reprint of (15), above, in *Sales Management: Contemporary Perspectives*, J. Allison Barnhill and A. O. Roberts, eds. (forthcoming)
37. Reprint of (15), above, in *Readings in Marketing Communication*, Lee Richardson, ed., Appleton-Century-Crofts. (forthcoming)

Also, I refer to pages from the University of Pennsylvania Law Review article. I brought a copy of it, and the title of this article is "Injury to Competition Under the Robinson-Patman Act." It has my earlier research on Robinson-Patman enforcement, and, if it would be agreeable, I would like to introduce the entire article.

Mr. DINGELL. Without objection that will be so done.

And, Mr. Brooks, the Chair will instruct you to meet with counsel, Mr. Potvin with regard to which portions and how much you would like to have inserted in the record. And the committee will be more than pleased to oblige you.

Mr. BROOKS. Mr. Chairman and members of the committee, I greatly appreciate your invitation to testify regarding small business and the Robinson-Patman Act.

An earlier witness before the committee, Prof. George Stigler, reflected the belief, or feeling, of many economists that small firms have, indeed, no business competing in markets with large firms. Economists of this persuasion alternate between the extremes of thinking of smaller firms as frail weaklings who should get off the field and let the big boys play, or—to the extreme opposite—as obnoxious boulders that lethargically obstruct the play of the game and richly deserve to be blasted off the field. In Stigler's testimony, the case of the *Utah Pie Co.*, 386 U.S. 685 (1967), was again offered as an example of the latter stereotype, having been cast in the same role in Prof. Phil Neal's White House task force report. But, actually, *Utah Pie* doesn't fit into either of these small business stereotypes. The Neal and Stigler statements were apparently based on hearsay, or on the reading of articles on the case written by those with an axe that had already been ground so fine it couldn't hold an edge. Much has been made of Utah's 66.5 percent market share, and its national competitors have been pictured as simply introducing vigorous competition into the Salt Lake City market to break up the established local company's entrenched position. Well, it is certainly true that many small businesses are "small" only in relation to the giants, and would appear very large to one not familiar with all the statistics, but anyone who read the actual Supreme Court opinion in the case would know that Utah Pie Co. did not fall into this category, and was far from the entrenched local monopolist featured in the "instant legend of Utah Pie" that has been created in so short a time. At the time of the trial, the employees of the company numbered 18, nine of them members of the family which controlled it. Its net worth was \$68,802.

Furthermore, Utah Pie was not defending an entrenched position against new competition, but was itself the new entrant into the market. The national firms, Continental Baking, Pet Milk, and Carnation, were all among the existing sellers in the Salt Lake City frozen pie market when Utah Pie Co. entered the frozen pie business in late 1957. It was immediately successful, and built a new plant in 1958.

Though small, the Utah Pie Co. had no trouble playing with the big boys. It entered at a price below the then-going prices of its national competitors, and its quality was such that one of the national competitors sent a spy into its plant to learn about its production process. By quality and price competition, it achieved a 66.5 percent share of the market in 1958, the year after it entered the market. During the following 3 years, each of the previously established national

firms at times cut price still further, helping them to regain lost market shares. This also kept the new competitor's profits down, and may well have repressed future attempts at aggressive competition by the new firm—or any other potential newcomer with like ideas. Despite the price cutting by its national competitors, Utah's prices were the lowest for most of the period. The overall market expanded greatly, and Utah's sales increased from \$353,000 to \$589,000 between 1958 and 1961, though its market share dropped from 66.5 percent to 45.3 percent. Profits, however, continued to range between the 1958 and 1959 figures of \$7,000 and \$11,897. Hardly the picture of a frail weakling who shouldn't play with the big boys; but hardly the picture of an entrenched local monopolist, either! One had only to read the first four pages of the final decision to find these things out! Yes; Will Rogers was correct when he said the main trouble was not what people didn't know, but what they did know that wasn't so! "Why they say about Utah Pie" is simply not true.

Twelve pages later in the court opinion there is a finding of predatory intent with respect to each of the national firms involved in the case. Stigler's testimony, however, makes use of this case to illustrate his doubts about whether attempts to kill off or repress a smaller competitor have ever actually occurred. He reasons that the larger firms could foresee that, if they later tried to increase prices, the small firm would cut price again, or other firms would rise to take its place. I could not help but be astounded by Stigler's statement before this committee that it was a "logical possibility" that a large national firm would think that, after it succeeded in knocking out a small, local competitor, the *same* local competitor would come back into the market. The only way I can believe a vanquished firm would even attempt such a thing would be to assume it was like a prizefighter who was punchy from the blows he had been receiving. Since Stigler sees most businessmen as farsighted and beady-eyed, it should be noted that he assumes the small ones, and *only* the small ones, to be amazingly short-sighted! It is rather inconsistent to feel that large firms will see no gain from a predatory course of action, having "foresight" of competition from existing and/or additional firms if they raise prices later; yet, at the same time feel that small firms can't even learn a lesson from the past, so that they would choose to undersell *again* if the large firms raised prices—thus bringing down upon themselves yet another price war. If, however, contrary to Stigler, the small firms are *not* short-sighted, or *can* learn a lesson, and will therefore choose even to *follow* a subsequent price increase by their large competitors, the large firms will therefore see an *advantage* to repressive/predatory pricing—will see it as a way to *avoid* rigorous price competition and potential entry. Objective consideration of the facts in the *Utah Pie* case shows it much more like that the effect of the price cutting by the national firms was to repress future competition in the Salt Lake City market rather than to promote it. It seems to me that large businessmen give more credit to the foresight of small businessmen in this regard than Stigler does.

While he seeks to use this case as "grist for the mill" that grinds out summary denials of the reality of predatory pricing, the *facts* of the case end up as "grit in the gears," and I think this particular mill needs shutting down. Though agreeing with Stigler on many of his

other positions, especially those of the time when, as he told this committee, he was "younger and perhaps wiser," I feel he is dead wrong in making a flamboyant and cavalier dismissal such as this. Since he characteristically leaves this position unqualified unless challenged, as he was in this committee, I have prepared a summary of a very substantial body of evidence and argument to the contrary, which is included in the addition to my statement. Professor Joe Bain, for example, singles out predatory and exclusionary tactics as involving the main aspect of market conduct where an empirical relation to structure and economic performance may be established, adding that "there is evidence concerning a number of individual industries in which 'successful' predation and exclusion have had substantial direct effects on structure and indirect effects on performance."

Stigler's testimony also voiced the feeling that the "future" and the "natural domain" of small business is—to use his words—"service industries." To quote, he said that "it is very hard to run service enterprises in a chain, and the solicitude and diligence and application of the self-employed small proprietor has great advantages in that area." Well, heaven knows we need better dry cleaners—double-creased trousers have taken on some of the aspects of a fad—but this is not sufficient argument to warn or direct smaller firms from other types of endeavor. "Solicitude and diligence and application" can be advantageous in other types of enterprise as well, and hunting elsewhere than in the "service fields" should not be considered as equivalent to a hopeless attempt to "poach on the baron's game preserve."

As support for his position on Robinson-Patman, Stigler appeals to a majority vote of economists, but economic beliefs that run away with popularity contests are not necessarily true. Often they are liked because they are simple, because they represent the way economists would like things to work, because they simplify analysis and/or calculations, or because the implications of the theory coincide with policy positions favored on other grounds. In the early 1930's, there were so few prominent economists agreeing with the tenets of national income analysis (now almost universally accepted)—you could have gotten all of them on a Honda motorbike and still had room for a pudgy pickup. But it is indeed odd to find a *Chicago* economist basking in the warmth of feeling that those who differ with him are in a minority. Since it is the frequent lot of Chicago economists to fall in the minority of their profession, and I share this position to a very great extent, it is even more surprising that Stigler would offer majority opinion as an argument for choosing one position over another.

In fact, the substantive arguments against the Robinson-Patman Act are largely based on hypothetical possibilities of bad effects, or abstract thinking about what *could* happen if the law were badly administered, rather than being based on objective consideration of *actual cases that have been brought under Robinson-Patman*. This is like opposing laws against speeding for fear that an ambulance carrying Werner von Braun to the emergency operating room of a hospital might be stopped by a rookie policeman with a defective speedometer on his squad car. As part of my statement, I would like to add an analysis of the actual past enforcement of the Robinson-Patman Act, recommendations for changes in future enforcement, and some addi-

tional comments on, and rebuttal to, some of the ideas in the Neal and Stigler Task Force Reports.

While I am sure that some clarification and modification of enforcement of this law could be of value, some of its provisions, while doing little economic good, also do little economic harm, and must be favored or opposed on other grounds. The main thrust of the law as conceived and written is such, however, that I am convinced that the Robinson-Patman Act has done much more good than harm. For example, existence of this law has contributed to the very fact that predatory/regressive pricing is relatively rare, and there must be other instances where it has not occurred because of the deterrence of the law. It should also be noted that, although it has been part of the legal framework of business for 34 years, the Robinson-Patman Act has not had the vicious consequences to competition that have been predicted or proclaimed continually since the original congressional debates on the bill.

Businessmen not only may victimize consumers, but also may victimize other businessmen with ultimate harm to consumers as well. In addition to the consumer interest, concern is due to the interest of those who aspire to achieve in the area of business enterprise. To assure the freedom to do so and fairness of the contest, regardless of size, reinforces belief in, and confirms the reality of, American ideals of opportunity and achievement.

(Additional material referred to follows:)

ADDITIONS TO STATEMENT OF ROBERT C. BROOKS, JR.

THE ROBINSON-PATMAN ACT—CRITICISM VERSUS ENFORCEMENT REALITY

The Robinson-Patman Act has been attacked again in recent additions to what has become a corpus of conventional wisdom. There is, in fact, only a small degree of highly selective consideration of actual cases to back up the often casual assertions and cavalier criticism of this law which for over thirty years has been an influence on, and has helped to shape, the nation's competitive scene.

Granted that such a law could influence the market system for better or for worse, it is hardly adequate to assert that it has influenced the system for worse in certain cases, or to condemn it simply because it *could* influence the system for worse. The *extent* of the "bitter" must be evaluated, and also the possibility of the "better" must be considered and evaluated as well. What is the empirical evidence in terms of actual cases—actions brought under Robinson-Patman as opposed to those which might have been brought or which were dismissed?

In my 1961 study of enforcement of the Act through June 30, 1958, I sought to evaluate the often-repeated charge of that time that the Federal Trade Commission saw "injury to competition" in many cases where there was only injury to individual competitors, with the danger that enforcement might actually serve to suppress the forces of competition itself. In view of the more recent wave of fashionability of this assertion in some circles, I have made a subsequent study of enforcement in the period from the end of 1961 to the middle of 1969, to develop a more current picture, and also provide comparison with the enforcement pattern previously established.

My approach to this question has been to set forth a valid and operable economic definition of "injury to competition" in the broad sense (and not in the narrow sense of "injury to a competitor"), and to determine the extent to which actual decisions under Robinson-Patman were conceptually consistent with this definition. I have also attempted to suggest methods of applying economic concepts in determining whether or not injury to competition has occurred, given specific sets of facts in particular cases. The bulk of my earlier work on this topic was reported in the April, 1961, *University of Pennsylvania Law Review*, at pages 777-832.

Both of the analyses were based on the economic concepts expressed in contested cases only—those decisions where evidence was presented in opposition

to, as well as in support of, the complaint. As for their relevance to the facts of the cases in which they were used, at least these concepts reflect the enforcing agencies' evaluations of the facts. There is probably less to be gained by appraising the agencies' judgment of the facts of cases, than there is in evaluating the economic relevance of the concepts that have been used. Differences in judgment we have with us always, but general agreement as to proper concepts may well be within reach.

Those supporting economic concepts which have served as bases for legal findings of "injury to competition" fall into three general groups. For the first two groups of concepts, there is little room for argument as to their economic validity or invalidity, but the third group requires some discussion.

VALID BASES

The first group includes findings of a tendency toward substantial reduction in the number of competitors in a market, findings of a tendency to hamper or suppress increases in degree of competition, barriers to entry, foreclosure of substantial parts of a market, or a lack of competitive behavior in the market. It would be generally agreed that these concepts reflect true injury to competition.

INVALID BASES

The second group includes cases where there was no basis except the finding of a price difference among customers, or—at the most—that the price difference served to divert business from the competitors of the discriminator. In such findings, without more, there is clearly no support for an inference of injury to competition in the broad, economic sense.

BASES REQUIRING FURTHER ANALYSIS

The third group includes findings which state that the price discrimination affected relative success in the competitive struggle between the favored and disfavored groups of customers. The favored customers were found to exploit their cost advantage by selling at lower prices and/or by increasing their non-price selling efforts. The significance of these findings for the effectiveness of market competition is unclear without further analysis. It is granted that if less-than-full-cost pricing is sporadic or is available to all on the same basis, then there could hardly be a substantial injury to competition among the customers, and even though there might be a competitive process of weeding out the inefficient and unwanted firms and products, it would be based on valid standards. If, however, such special prices are systematically limited to only a part of the customers, a persistent handicap unrelated to efficiency is placed on the unbefited part of the market, and this handicap destroys the validity of the subsequent competitive process as a means of eliminating inefficient and unwanted firms.

What of a firm selling hundreds or thousands of products? In such cases, a cost-of-goods handicap on one item alone would hardly have a substantial effect on survival of the firm. Nevertheless, such a handicap will influence the profitability of the particular item involved, and thus might lead the firm to withdraw as a supplier of that item, thereby reducing the variety of alternative sources for that particular product. Furthermore, if the firm is systematically handicapped in its cost-of-goods on one item, it is quite possible that similar conditions in the market for other items of its line would produce similar handicaps in other items that it sells. Thus, it might be found that a discrimination on a minor item is typical of the situation pertaining to a substantial proportion of the firm's total business.

On the other hand, the price discriminations may be, on an over-all basis, offsetting rather than cumulative. For example, with manufacturers located in different geographical areas, and buying component parts from suppliers who are also scattered geographically, it might be found that a given manufacturer's cost advantage on some components would be substantially offset by cost disadvantages on other components. Or it might be found in a disorganized market that a given buyer's preferential cost treatment from one supplier was offset by comparable preferential treatment given by other suppliers to the given buyer's competitors. There is no economic justification for intervention in cases such as these.

To return to the economically harmful cases, however, where the cost differences on various items are cumulative rather than offsetting, cumulative distortion of the market process would result in the survival of favored firms which would otherwise be eliminated because of inefficiency, and/or elimination from the market of unfavored firms which would otherwise survive. This would be true if firms in certain locations generally received preferential price treatment not based on cost savings, with no offsetting disadvantages on cost prices of other items, or if large firms generally received unjustified preferential price treatment.

A finding of true economic injury in this third group of cases would be justified if the concept was one of cumulative price discrimination, but would not be justified if the price discrimination was offsetting.

THE RECORD OF ENFORCEMENT

For the period from 1936 to June 30, 1958, of the 51 Commission decisions where injury was found under Section 2a, 21 were based on the first category of concepts where true economic injury is implied. Twelve of the 51 were based on the second category of concepts which lacked significance for competition in the broad, economic sense. And 18 of the 51 decisions were of the third category, where valid findings as to true economic injury generally requires the use of more precise concepts.

The following table shows the bases for findings of injury under Section 2a for the period from January 1, 1962 to the middle of 1969, in comparison with the figures for the earlier period studied.

TABLE I.—BASES FOR FINDINGS OF INJURY UNDER SECTION 2a

	Cases	Valid basis	Invalid basis	"Type III"
1936 to June 30, 1958.....	51	21	12	18
Jan. 1, 1962 to mid-1969.....	22	4	0	18

A clear improvement is shown in the complete absence of findings with an invalid basis, when such findings amounted to almost one-fourth of the total in the earlier period. An improvement was also discovered within the "Type III" category. While a cumulative aspect was specifically found in some of the earlier period decisions, the question was not specifically considered in most of them. In the period subsequent to 1961, however, 7 of the 18 "Type III" findings were strengthened by further findings that the differentials were "regular, established, continuing," or "not nonrecurrent." Enforcement could be further improved, of course, by making such findings a standard requirement in reaching a decision with only a "Type III" basis.

The decline in number of cases based on the first category of concepts—where the validity of the basis is most clear—may well be due to a reduction in number of violations, since the law had been part of the framework of our market system for over a generation at the start of the period, and the clear-cut cases would be the ones most severely curtailed by the presence of the law. Were it not for the law, and its likelihood of vigorous enforcement, the number of instances might have remained as high as before.

While this comparison has been based on a study of cases where injury was found, it should also be noted that many investigations have been closed on the basis that a finding of injury could not be made, and many cases have been dismissed because injury was not found. Based on the tabulation by David F. Shores and Louis R. Sernoff, F.T.C. attorneys, of over 5000 investigations involving charges of violation of any section of the Robinson-Patman Act, at least 1400 were closed on the basis of "no violation," "insubstantiality of practice," or "insufficient evidence of injurious effect." Less than 1000 complaints were docketed. Analysis of a survey of case dismissals by David M. Malone and Eric F. Stoer of the F.T.C. shows that there were 36 dismissals of 2a cases in the earlier period analyzed above, and 14 dismissals of such cases in the later period, based on failure of proof other than jurisdictional, insufficient evidence to warrant trial, or the acceptance of cost justification, meeting competition defense, or changing market conditions.

Certainly, this is not a picture of myopic roughshod enforcement where there is no awareness of the possibility that price differences may not be hurtful, or may even be helpful to competition. The enforcement record casts real doubt on the basis for assertions and/or implications that it is the order of the day in Robinson-Patman enforcement to ignore such possibilities willy-nilly in all cases.

In general, the now-traditional criticism of Robinson-Patman is growing out-of-date. Much of it always was.

For true improvement, awareness and precision are required from critics to the same degree that they demand them in enforcement.

RECOMMENDATIONS FOR FUTURE ENFORCEMENT OF THE ROBINSON-PATMAN ACT

SECTION 2(c) — BROKERAGE

This has the weakest justification of any part of the Act, and thus has been a tempting target for attack. The attacks may not merit the effort involved, however, small though it may be, as it is doubtful that much economic harm—or good—is done by enforcement of 2(c), as discussed by Dirlam and Kahn, *Fair Competition* (1954), pp. 239–241. The same consideration also indicates, of course, that enforcement does not warrant the resources involved, small though they be, unless the brokerage is a subterfuge for price discrimination causing injury to competition. Corwin Edwards and Mark Massell have suggested that brokerage savings might be acceptable under a cost defense, where the “brokerage allowance” does not have a history in the case of having been another name for price concessions causing 2(a) injury. There has apparently never been a ruling on this point, as the defense has never been made in a case where this was the actual situation.

SECTIONS 2(d) AND 2(e)

There is nothing to be gained by enforcement of these sections in cases where the payment or service is offered to all, proportionate to purchases, with equal ease of availability, and requiring documentation of amounts spent by categories. If these conditions obtain, it is clear that no economic harm results from the voluntary choice of some customers to decline such offers. If, however, all these conditions do not obtain, there is likely to be concealed price discrimination. Furthermore, it is very doubtful that this form of price discrimination would be of the “sporadic, unsystematic” variety; on the contrary, it is highly probable that “cumulative,” economically harmful discrimination would be involved (see discussion below on determination of injury). Excepting cases where the discrimination is not of the “cumulative” type, the economic injury would be of the same nature as that of “cumulative” price discrimination under section 2(a), and, therefore, enforcement of 2(d) and 2(e) in such cases would just as clearly be of value as enforcement of 2(a).

*Tentative suggestions re: 2(d) and 2(e)—*To reduce economic waste, and to provide functional availability to as many customers as possible, options should be encouraged—or even specified—providing alternate forms of services and/or promotional allowances (handbills, counter displays, etc.), provided the total cost has the same proportional relationship to purchases, regardless of option elected by the customer. . . . A further option might be encouraged—that of receiving a partial cash rebate in lieu of the cost of the service or promotional activity, with the rebate a uniform fraction regardless of customer or volume of purchases, with all options available to all customers.

If, on careful consideration, these suggestions are deemed worthy of adoption, this should be made widely known by public announcement, which should also make clear that documentation of spending must be made in all cases where the service or promotional activity is elected.

THE COST DEFENSE

A persistent criticism—and a fallacious one—is that the cost defense does not allow for marginal cost pricing. Even if the charge were true, it would have little import, however. Simply that a practice may be “good business” for a firm does not change the fact that it may result in injury to competition. Just as “injury to a firm” does not necessarily involve “injury to competition,” a practice that is good for a firm is not necessarily also good for competition.

Furthermore, and this should be part of any announcement regarding standards for the cost defense, the defense requires *differences* in costs, and the differences would have to be in incremental (marginal) costs, since differences in allocations of fixed costs or overhead charges are not allowed. Even Adelman has stated, though it is buried in a sober "Appendix" to his rather flaming article, "The Consistency of the Robinson-Patman Act," *Stanford Law Review*, December 1953, the "Act, as is well known, disregards incremental cost and refers only to average or full cost. The economist's reaction has usually been to shrug off the work of benighted politicians as unworthy of his analysis. Yet we submit that if our subject is to frame a public policy, the two definitions are for all practical purposes interchangeable." Adelman develops the point at length in his "Appendix." In any case, it is clear that a difference in incremental costs will also appear as a difference in full costs, since differences in allocations would involve arbitrary discrimination, pure and simple.

Actually, the Commission should welcome, and encourage, valid cost defenses where they actually exist. It is truly unfortunate that many businessmen and lawyers have been "brainwashed" by criticism of the Act, and believe that it is hopeless to attempt a cost defense. Making known the extent to which cost defenses have been accepted, in terminating investigations as well as in dismissing cases, would still not be as effective as a statement of cost defense standards issued as a public announcement. While attorneys might object to having "their hands tied" by such a statement, this consideration is more than offset by likely gains in self-enforcement and by clearing the air of mistrust and even outright error regarding what *is* acceptable as a cost defense. Though given cases might be lost by making standards more widely known on this and other aspects of enforcement, the overall impact of the Act would improve in quality, and attention could be channeled to other cases more worthy of enforcement activity.

The preamble to a public announcement utilizing the Taggart Report might take the following draft form:

"In order to make Commission policy toward the cost defense better known, to improve self-enforcement, and to avoid the encouragement of undesirable restrictions on pricing flexibility, the [Taggart Report] is hereby issued in conjunction with a Commission Memorandum showing its relation to accounting principles which have been generally followed by the FTC's Division of Accounting."

DETERMINATION OF "INJURY TO COMPETITION"

Based on my analysis of 2(a) decisions from 1962 on, enforcement of secondary line cases could be further improved by concentration of attacks on those cases where the pattern of selectively-given advantages is cumulative in the markets of the buyers, rather than offsetting or random. The importance of the distinction in regard to the question of true economic injury is covered on pages two and three of the Memorandum. A specific evaluation on this point, to be a standard requirement for secondary line decisions, and for investigations as well, would serve to make the true importance of economic effects—and thus the value of enforcement—much more precise.

The Commission should continue to avoid primary line cases involving *only* "injury to competitors," but, because of the blurring or swamping caused by the high frequency of such cases, should take particular care to single out those instances where there is *also* a tendency toward substantial reduction in the number of competitors in a market, a tendency to hamper or suppress increases in degree of competition, foreclosure of substantial parts of a market, or increases in barriers to entry. It should be noted that in all these types of "injury to competition," "injury to competitors" occurs as well. Only in the case of price conspiracy or other lack of competitive behavior can the broad type of "injury to competition" occur without the narrow as well.

While it doesn't hurt to be reminded that in many sorts of situations where price discrimination injures individual competitors, it is, nevertheless, for the good, and should not be attacked; this point has apparently been well argued by defense attorneys in those cases where the facts applied. It is hoped that such arguments will be made in all cases for which they are valid, and that they will be accepted in all such cases. The Neal Report, for example, points out that, "in highly concentrated markets . . . where price reductions are sporadic and not part of a systematic pattern favoring large purchasers, they may be

the first step toward more general price reductions," but mentions no cases where such price reductions were prohibited. Hopefully, there will continue to be a lack of such litigation, so that no one wishing to make such reductions will have reason to be thereby discouraged from doing so.

Also, as the Neal Report additionally reminds us, "a new or potential entrant may find it necessary to reduce prices in particular cases, . . . but . . . if he must make corresponding reductions to all other purchasers, he may decide not to enter." Again, no mention of any such actual cases, but later critical reference to *Utah Pie* indicate that it was likely to have been thought of as example, and the decision has been attacked by others on this basis. In fact, however, Utah Pie was the new entrant to the frozen pie market, and achieved the bulk of the market by cutting price. The defendants in the suit were the "established" firms that retaliated by cutting prices still further to regain market share. They also succeeded in keeping Utah's profits down at the "introductory year" level of around \$10,000 for a number of years, and may well have sought to repress future attempts at aggressive competition on the part of Utah—or any other local newcomer with such ideas. Thus, again, the "example" may have to search further for an actual "case," and it is to be hoped, of course, that cases which are, *in fact*, anti-competitive, will not succeed.

Some of the criticism of *Utah Pie* reflects a predisposition to believe that there is "no such thing" as predatory price discrimination, a position accorded substantial, though rather limited, status by the Stigler Report. For actual cases studied, however, this conclusion was often based on the fact that the victim of the price cutting survived, or even merged with the aggressive firm. After starting out with a predatory policy, however, a firm might see changes in the market that would make a change of course desirable before the victim's actual demise. The victim might have reformed, decided to mend his ways, and become more docile and agreeable to the predatory firm; or may have become willing to sell out at a bargain price. In either case, the market would be changed for the worse.

Also, in addition to the immediate damage, a threat is created for other firms in the market, and for potential competitors as well, that they stand in danger of the same sort of episode.

It is sometimes argued that price discrimination is pro-competitive when it enables smaller firms to grow closer to the sizes of their largest rivals, thereby providing more effective competition. But when the third or fourth firm grows closer to the size of the second or first, the disparities increase between it and the fifth, sixth, and remaining firms that are even smaller. The aggressive firm will likely come to terms with its larger rivals, and become like them, while the firms at the lower end of the scale may find it difficult to remain in the restructured market. Certainly, any argument based on "justice" for the middle-sized firm wishing to grow larger cuts the other way in regard to still smaller firms, and should not be allowed to justify price discrimination which would otherwise be illegal. Predatory and/or repressive forms should be attacked, regardless of the size of firm. This is not only in the consumer interest, which otherwise would ultimately suffer, but also in the interest of those who aspire to achieve in the area of business enterprise, assuring freedom to do so and fairness of the contest—regardless of size. This reinforces belief in, and confirms the reality of, American ideals of opportunity and achievement.

To avoid discouraging aggressive behavior of a pro-competitive type, however, and to dispel any ideas that it is pointless to contest a price discrimination case on the question of "injury," a public announcement on standards of injury would make for more efficient enforcement. It could also use the legal equivalence of "price difference" and "price discrimination" to frame a statement that would also demonstrate the error of the Stigler Report's assertion that the Commission "tends to equate" the terms "erroneously." This could be done with a statement of the following form:

"The Commission does *not* consider price differences of the following types as illegal price discrimination within the meaning of the Robinson-Patman Act:

"1. Sporadic price reductions in highly concentrated markets, where not part of a systematic pattern favoring some purchasers over others.

"2. Reductions by a new entrant in order to overcome the inertia of established trade relationships.

"3. . . ."

"4. . . ."

SECTION 2(b)—MEETING COMPETITION DEFENSE

I do not believe that it is economically sound to let "defensive" meeting of competition provide a defense to a charge of price discrimination. Robert A. Wallace and Paul H. Douglas, commenting on the *Standard Oil (Indiana)* case, characterized the selective meeting of competitive offers from an outside refiner seeking to enter the Detroit gasoline market as having anti-competitive consequences: "In summary, the effects of the discriminations in the Detroit area were to block the entry and growth of small refiners and, at the same time, to maintain high prices for major brand gasolines." ("Antitrust Policies and the New Attack on the Federal Trade Commission," *The University of Chicago Law Review*, 19 (Summer, 1952), 1, at p. 26.)

There is nothing objectionable *per se* in the practice of a firm meeting competitive price bids to individual customers, or in meeting local competitive situations so as to maintain a share of the business in lower-price markets without sacrificing part of the larger profits available in the higher-price markets. If practiced by a firm whose size, geographical dispersion, and product diversity are not greatly larger than its competitors, there will be no substantial injury to competition in the broad, economic sense. However, if practiced systematically by a dominant, more widespread, or more diversified competitor, then the effect of such "defensive meeting of competition" will be to injure competition in the broad sense by repression of competitors who attempt to gain business by price cutting.

Since, furthermore, "aggressive meeting of competition" is difficult to conceive, I would urge that consideration be given to the possibilities for deleting the "aggressive/defensive" standard from the enforcement picture under section 2(b).

SUPPLEMENT TO RECOMMENDATIONS FOR FUTURE ENFORCEMENT OF THE ROBINSON-PATMAN ACT—FURTHER COMMENTS ON THE NEAL AND STIGLER REPORTS

(By Robert C. Brooks, Jr.)

The main value of the Neal and Stigler Task Force Reports is to remind the Commission of the sorts of situations where price differences are "for the good" and should not be attacked. They are not an indication of actual enforcement, since the Commission has largely tried to avoid the types of cases which the Neal and Stigler groups, and others before them, have said would be undesirable. They are of little help in identifying cases where price differences *should* be attacked.

The Neal Report states that, "there are many reasons for price discrimination and most of them are related to the improved functioning of the competitive system," and, "it is possible for price discrimination to adversely affect competition, but such instances are exceptional." It should be noted, however, that enforcement of the price discrimination law may be an important reason for the low incidence of cases where competition is affected adversely by price discrimination, and the number of instances would be much greater, were it not for the Robinson-Patman Act.

Turning to a key assertion of dubious merit from the Stigler Report, that there is now "an impressive body of literature arguing the improbability that a profit-maximizing seller, even one with monopoly power, would or could use" predatory price cutting. This is in apparent reference to the replications of the conclusions of Adelman regarding A&P and those of McGee on Standard Oil.

While the Report made no specific citations to this "impressive body of literature," there are a number of citations to the contrary that might be made:

That a predatory or repressive effect may result (as well as not result) from such price cutting is shown in Brooks, "Injury to Competition under the Robinson-Patman Act," *University of Pennsylvania Law Review*, 109 (April, 1961), 777, at pp. 796-798, and the same writer presents a fully documented recent example of such an anti-competitive effect in "How Can Government Best Promote an Effective Market System?" in *Money, the Market, and the State* (1968), at pp. 208-225, especially at pp. 217-221.

It is likely that Adelman's writings on A&P, and subsequent recitation of his sayings on predation, make up the bulk of the "impressive body" of literature, but Adelman's position on A&P has been sharply challenged by Dirlam & Kahn

in *Fair Competition* (1954), at pp. 212-216 and 234-241, and by Lanzillotti in "Pricing Objectives in Large Companies," *American Economic Review*, XLVIII (December, 1958), 921, at p. 935, and in his subsequent reply to a comment by Adelman, *American Economic Review*, LXIX (September, 1959), 679, at pp. 679-682. Also, Werner Z. Hirsch and Dow Votaw, "Giant Grocery Retailing and the Antitrust Laws," *The Journal of Business of the University of Chicago*, XXV (January, 1952), pp. 1-17; Dirlam and Kahn, "Antitrust Law and the Big Buyer: Another Look at the A&P Case," in *The Journal of Political Economy*, 60 (April, 1952), pp. 118-32, and subsequent reply in the same *Journal*, 61 (October, 1953), pp. 441-46.

While the assertions of John S. McGee regarding the old *Standard Oil* case are sometimes cited to support the "new thinking" on predatory pricing, McGee's conviction "that Standard did not systematically, if ever, use local price cutting in retailing, or anywhere else, to reduce completion" is based on his belief that "to do so would have been foolish." ["Predatory Price Cutting: The Standard Oil (N.J.) Case," *Journal of Law & Economics*, 1 (1958), 137, at 168] and that he could find "little or no evidence to support it" [at p. 138] from his own reading of the 13,500 page Record of the case. His position that such price cutting would have been foolish has been challenged (*University of Pennsylvania Law Review*, 109, at 788-789), and others might draw a different conclusion from a consideration of the Record and/or of other sources. In fact, contrary conclusions have been drawn: Ida M. Tarbell, *The History of the Standard Oil Company*, 2 vols., (1904), reissued, 2 vols., (1925); William S. Stevens, *Industrial Combinations and Trusts* (1922); E. A. G. Robinston, *Monopoly* (1941), at pp. 73-74 and 197-205 especially at p. 204; George W. Stocking, "The Attorney General's Committee Report: The Businessman's Guide through Antitrust," *Georgetown Law Journal*, 44 (November, 1955), 1, at p. 14.

This classical example of predatory price cutting was even used by an earlier George J. Stigler: "If the firms in an industry can impose large capital requirements on potential rivals, they will retard the rate of entry of these rivals, and a whole arsenal of devices have been used to this end. Consider first the technique of the old Standard Oil Company to drive out rivals. This policy was feasible if, and only if, it was difficult for the local rival to accumulate capital funds to finance a price war. Could he do so, the price war would have been futile and Standard would not have undertaken it." [*The Theory of Price*, revised edition (1952), at p. 227.] Having unreservedly accepted the long-standing view on the factual basis of Standard's conduct, Stigler just as unreservedly dismisses it as "folklore" in his subsequent edition [(1966), at p. 224], citing only the work of McGee as a basis. What is "standard on Standard" with Stigler can apparently be reversed with ease. He continues to make his point as a hypothetical one, but, as for actual cases, is apparently satisfied with Standard Oil—to summon, then dismiss it as illusion. However, as indicated above, the literature is not devoid of conclusions to the contrary, and still other citations could have been made.

Indeed, predatory and exclusionary tactics have been singled out by Bain as involving the one main aspect of market conduct where some empirical association to structure and performance may be established. Bain adds that "there is evidence concerning a number of individual industries in which 'successful' predation and exclusion have had substantial direct effects on structure and indirect effects on performance." *Industrial Organization* (1959), at pp. 422-423. [For more, see the substantially similar passage from the 2nd edition (1968).]

Another type of price discrimination, in this case selective meeting of competitive offers from an outside refiner seeking to enter the Detroit gasoline market, has been characterized as having similar anti-competitive consequences. "In summary, the effects of the discriminations in the Detroit area were to block the entry and growth of small refiners and, at the same time, to maintain high prices for major brand gasolines." [Robert A. Wallace and Paul H. Douglas, "Antitrust Policies and the New Attack on the Federal Trade Commission," *The University of Chicago Law Review*, 19 (Summer 1952), 1, at p. 26.]

POSSIBLE GAINS FROM PREDATORY PRICING

While a predatory firm may set out to "destroy" a rival, the process may well make a change of course preferable to drawing the procedure out to the bitter end. Somewhere along the line, the victim may have become easier to get along with, or may have become more willing to sell out at a "bargain" price that makes merger more attractive than a "fight to the death." But the predator's

being "ready, willing, and able" to fight to the victim's death would still be a necessary part of the background. That the victim became a docile rival, and thus survived, or that the victim was able to sell out at a price that seemed attractive in view of the alternatives, does not mean that a predatory purpose was not in the picture. Even though, at the start, a policy of "rule or ruin" seems attractive to the potential predator either way, it might later develop that "ruling" could be arranged on terms more attractive to both sides than a continuing drawn-out process of ruin. The same terms might even be accepted by other rivals who could be intimidated by the threat—or fear—that the same thing might happen to them. In addition to the gains from existing rivals' greater willingness to sell out or to "behave," the object lesson represses potential rivals as well, raising barriers to entry.

STILL FURTHER EXAMPLES OF PREDATORY AND REPRESSIVE PRICING

An unchallenged "classic" example is gunpowder: William S. Stevens, "The Powder Trust, 1872-1912," in *The Quarterly Journal of Economics* 26 (1912), pp. 444-481; also the same author's *Industrial Combinations and Trusts* (1922), at pp. 333-339; and on the same subject, George W. Stocking, *Workable Competition and Antitrust Policy* (1961) at the extended note on pp. 320-321, from an article originally appearing in the *Virginia Law Review* 44 (1958), pp. 1-40.

Other examples include tobacco, William H. Nicholls, *Price Policies in the Cigarette Industry* (1951), at p. 26; building products, Corwin D. Edwards, *Maintaining Competition* (1949), at pp. 169-170; pectin, Almarin Phillips, "Price Discrimination and the Large Firm," in the *Virginia Law Review* 43 (1957), pp. 685-696, especially regarding the dissent of Commissioner Mead; bakery products, cited by Jerrold G. Van Cise, *The Federal Antitrust Laws* (1965), at p. 50; chicory (*E. B. Muller v. FTC*), discussed in Robert C. Brooks, Jr., "Businessmen's Concepts of Injury To Competition," *California Management Review* III (1961), pp. 89-101, also *Antitrust Bulletin* VI (1961), pp. 569-590, also in *Social Issues in Marketing*, Lee E. Preston, ed. (1968), pp. 168-179. The *Muller* case, as well as other examples of predatory pricing, is cited by the *Attorney General's National Committee to Study the Antitrust Laws* (1955), at pp. 165-166. Examples of predatory pricing subsequent to this 1955 report appear in a supplement to the report prepared by the Section of Antitrust Law of the American Bar Association. These recent examples include woodenware (*Forster Mfg. Co. v. FTC*), roofing materials (*Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*), frozen pies (*Utah Pie Co. v. Continental Baking Co.*), and possibly other cases cited in *Antitrust Developments, 1955-1968* (1968), at pp. 128-131.

ATTACK PRACTICES OR RESHAPE STRUCTURE?

It has become a commonplace saying in industrial organization that direct attacks on excessive market power are superior to attacks on the undesirable market practices that depend on that power. Is there, then, any valid place in antitrust enforcement for a market conduct approach? If the practice is a symptom of market power or of collusion, why not treat the basic cause, and eliminate the power or attack the collusion through the Sherman Act? First, the monopoly power may be accompanied by off-setting advantages to the economy, such as efficiency, and it may be unwise to eliminate the power itself. Second, the radical approach may be ineffective, possibly because the monopoly is based on a legal patent, or, for some other reason, the courts will not break up the monopoly or attack the market power. In such cases, if the symptom (market practice or conduct) is bad in itself, then the symptom should be treated directly. But since either conspiracy or monopoly power may exist without any manifestation in disreputable practices, there is a need for attacking them in cases where such practices do not accompany them. While direct attacks on structure may be more efficient in general, a conduct approach serves to fill in important gaps and weaknesses. My article, "How Can Government Best Promote an Effective Market System?" attempts to answer this question, laying the groundwork by means of an analysis of predatory/repressive price cutting. It illustrates some relative weaknesses of the structural approach—partly due to the nature of economic analysis and partly due to the nature of legal procedure, and I request that it be put in the record of these Hearings along with two pages from another article of mine.

To emphasize the risk in the conduct approach, the task force reports point out that price discrimination has an adverse effect on competition only in exceptional cases. But this only poses the question of how many actual cases involved the harmful type, and how many did not. Such questions can best be decided in legal proceedings, based on the facts of the cases, and not on the probabilities of the events in general.

In the opinion of some economists, the best thing about the nation's agricultural policy is that it hasn't worked! This is not a charge of traditional critics of the price discrimination law. They do not say that the Robinson-Patman Act has had no effect, but say instead that the effects have been bad. Yet many of these critics view the present operation of our market system with rosy enthusiasm, even though Robinson-Patman has been part of the market scene for a third of a century. At least it is worth noting that the Act has not had the crippling or vicious consequences to competition that have been predicted or proclaimed continually since the original Congressional debates on the bill.

A characteristic assumption of some writers is that the largest firms are invariably the angels of vigorous competition and low prices vis-a-vis the smaller firms, but this was convincingly disproved by my own recent price-shopping of a specified model of a brand of refrigerator my family had decided on. It was of the best known brands, and I telephoned all the dealers in Nashville, 10 or 12 in total. The two lowest prices were offered by two of the smallest stores, while the large firms, the department stores and the units of national chains representing themselves as discount stores, gave me prices from \$25 to \$65 higher. While many critics of legislation on pricing fear that large firms will be discouraged from doing "their thing"—giving the public the lowest prices, oftentimes it is the small firms that are the sources of the best alternatives for buyers. It would truly be a shame if there were no legal impediment to larger firms deciding to punish their small rivals for behaving "too competitively" or for trying too hard to get business.

While the task force reports list possibilities for price discrimination litigation to have harmful effects on competition in the broad, economic sense, there is a notable absence of reference to actual cases. The worst of the harmful possibilities appear to have been avoided in enforcement, as my analysis of the concepts used in enforcement indicates. For example, a new entrant, to get into a market, may cut price to enter. Unfortunately, the established firm may cut its price still further to discourage or repress future entry or price cutting. Analysis of actual cases shows that the attack was generally directed toward the latter, anti-competitive form of price cutting, in contrast to the type of attack feared on the basis of the worst possibility.

In view of the suspicions and misconceptions generated by criticism of enforcement and of the law itself, however, it might be advisable to dispel false images and sharpen the enforcement picture by making known the best concepts and standards of enforcement as those to be applied in the future.

MINOR COMMENTS ON THE STIGLER REPORT

From the Working Paper on the Conglomerate Merger: Action against conglomerate mergers is protested on the ground that "it is undesirable to hang a man for an imaginary crime."

Comment: This fails to distinguish between criminal and civil procedures.

From the Working Paper on Reciprocity: A firm in a colluding industry which is fixing prices "would be willing to sell at less than the cartel price if it can escape detection. Its price can be reduced in effect by buying from the customer-seller at an inflated price. Here reciprocity restores flexibility of prices."

Comment: This relatively small consideration ignores a more important opposing consideration—that *prohibition* of reciprocity would weaken the tendency to stay in the basic collusive arrangement, and would increase the chances for the cartel being broken up, because individual situations calling for violation of the price fixing agreement could less easily be resolved through covert action.

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INJURY TO COMPETITION UNDER THE ROBINSON-PATMAN ACT *

(By ROBERT C. BROOKS, Jr.†)

INTRODUCTION

With certain exceptions, the Robinson-Patman amendment to the Clayton Act prohibits price discrimination where its effect may be "substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them" ¹ It has frequently been stated that the enforcing agencies—the Federal Trade Commission and the courts—have confused "injury to competition" with "injury to a competitor," ignoring the fact that injury to competitors is to be expected in a state of vigorous competition.²

* The author is grateful for the valuable comments and suggestions made by Professors Corwin D. Edwards, John S. McGee, and Jacob I. Weissman of the University of Chicago; by Professors George W. Stocking, James W. McKie, and James S. Worley of Vanderbilt University; and by Miss Betty Bock and Messrs. Irston R. Barnes and Frank J. Kottke of the Bureau of Economics of the Federal Trade Commission. This Article is the result of a study made under a fellowship granted by the Ford Foundation. However, the conclusions, opinions, and other statements of the author are not necessarily those of the Foundation or of any other organization or person whose aid is here acknowledged.

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¹ Robinson-Patman Act (Price Discrimination) § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

² See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 164-65 (1955); H.R. REP. NO. 1422, 81st Cong., 1st Sess. 5-6 (1949). "We mouth the phrase 'injury to competition' so often that we confuse it with 'injury to a competitor.'" Standard Oil Co., 43 F.T.C. 56, 65 (1946) (Commissioner Mason, dissenting). See generally EDWARDS, THE PRICE DISCRIMINATION LAW 518-45 (1959).

Certainly there is a need to find a valid and operable economic definition of "injury to competition," and to determine the extent to which decisions of the Commission and the courts are consistent with such a definition. In conducting such an inquiry, we shall delineate *economic* concepts of competition and injury to competition, and appraise methods of applying such concepts to specific cases in an economic approach to the question of whether "injury to competition" has occurred. A survey then will be made of the *legal* meanings attached to "competition" and "injury to competition," with special attention to the multiple standards of injury (including the standard of "fairness") under the Robinson-Patman Act. Limiting ourselves to decisions in cases where evidence was presented, we shall then classify the legal bases for findings as to injury in terms of the economic concepts to which they apparently refer. Our purpose is to determine the extent to which legal decisions are conceptually consistent with an economic approach, and to suggest ways by which legal enforcement could be brought into closer conformity with economic reality.

ECONOMIC APPROACH

Economic Meaning of Competition

Perfect Competition

While "competition" has many different meanings, and there are many different types, the term "always denotes the presence in a specific market of two or more sellers and two or more buyers of a definite commodity, each seller acting independently of every other seller and each buyer independently of every other buyer."³ The term "perfect competition," however, has a much narrower meaning: every product is offered for sale by a large number of sellers, each selling a product identical with the others', and each so small as to have no influence on the market. Furthermore, neither sellers nor buyers have their freedom of action restricted by custom, lack of information, public sentiment, or fear of reprisals by competitors or the government.⁴

It has been pointed out that if one of the conditions essential to perfect competition is absent, it does not follow that the more the other conditions are present, the more desirable will be the resulting

³ WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 1 (TNEC Monograph No. 21, 1940).

⁴ Stigler has given three requisites for competition: "1. That each economic unit be sufficiently small so it exerts an imperceptible influence on prices. 2. That neither government nor private associations erect obstacles to the movement of resources into or out of industries, or regulate the prices paid or received by economic units 3. That entrepreneurs possess information on prices and hence on profits." STIGLER, THEORY OF PRICE 13-14 (rev. ed. 1952).

form of competition.⁵ Since the entire set of conditions appears to be unattainable for all practical purposes in the present technological, social, and political situation, some question arises as to whether reaching toward only a part of the conditions will result in a net gain. In order to bring theory closer to operation, J. M. Clark developed the concept of "workable competition."

Workable Competition

Clark defined workable competition as a "rivalry in selling goods in which each selling unit normally seeks maximum net revenue, under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as 'the same' product, necessitating an effort by each seller to equal or exceed the attractiveness of the others' offerings to a sufficient number of sellers [buyers?] to accomplish the end in view."⁶ In addition to defining workable competition in terms of market structure and limitations on the scope of action of a single seller or buyer, it may be defined, as was done by Adelman, according to the performance of firms in the market:

Workable competition has no close connection with the size of business firms or the concentration of an industry. It is compatible with many small firms, as in apparel; with a few large ones as in automobiles; and with large and small ones together, as in distribution.

. . . Competition requires rivalry in buying and selling among business firms which are not in collusion. But rivalry alone is not competition. A sufficient number of alternatives open to any given buyer or seller are necessary, including alternatives in the type of goods ("stripped" versus begadged models, for example).

. . . A proper blend of competitive and monopolistic elements is needed in any particular market to produce workable competition, and small changes in the ingredients may produce large changes in the result.⁷

⁵ Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241, 242 (1940).

⁶ *Id.* at 243. See Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1268 n.6 (1949): Clark and others "clearly think of workable competition in terms of market conditions imposing a set of limitations on the scope of action of the individual buyer or seller. These limitations prevent the exploitation of buyers by sellers too few in number or in collusion with each other and prevent the exploitation of sellers by buyers. There are an 'adequate' number of alternatives from which to choose."

⁷ Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1303 (1948).

Thus, seeing no necessary relationship between performance of firms and the limitations imposed on them by such structural elements as firm size and market concentration, Adelman looks directly at the results produced by a market in order to measure its workability: "The pursuit of business advantage in a competitive market takes the form of reductions in price, improvements in quality, and a constant search for cost reductions and innovations."⁸

The virtue of the performance approach lies in its recognition that structure alone is not sufficient to produce a satisfactory type of competitive result, particularly in view of the point made by Clark that if more than one of the structural elements of the "perfect" market are missing, we cannot be sure, *a priori*, whether the establishment of but part of these elements will improve or impair the effectiveness of the market.⁹ But there are limitations to the approach—it can mean all things to all men and so could prove to be arbitrary, and it is doubtful that an enforcing agency would be more successful manipulating performance directly than it would be simply making changes in the structure of the market. Moreover, a system of direct orders designed to remedy unsatisfactory performance transfers the affected firm's management to a state body. A result of such transfers would be, in cases of widespread poor performance, less rather than more competition, for diversity of business behavior would doubtless be reduced. Thus Corwin D. Edwards has described the performance approach as, "not a new way to enforce competition, but a substitute for the safeguards of competition."¹⁰

Although deficient as a primary basis for public policy, the performance approach can, however, be valuable both as a guide and as a supplement to the use of structural standards. Since the "perfect" market cannot be considered a norm, the performance approach pro-

⁸ *Ibid.*

⁹ Clark, *supra* note 5, at 242.

¹⁰ Edwards, *Public Policy and Business Size*, 24 J. Bus. 280, 286 (1951): "Under the policy of competition, business behavior is free from government interference so long as competition itself is not impaired. The government's right to intervene is limited strictly to the scope necessary to maintain the system of competitive checks and balances. Under the standard of social performance, however, any business act would be forbidden if it appeared to the government to be detrimental to the public good. In the application of such a standard the government's right of investigation and of intervention would necessarily be unlimited. The power to dissolve an enterprise or to enjoin its conduct if its acts were disapproved would give the government, in practice, authority to guide and advise business. The result would be a new and pervasive kind of government control. It would be a long step, not toward competition, but away from private enterprise." Another disadvantage of the performance approach is that changes in level of performance could take place more rapidly than changes in market structure, and thus a public enforcing agency would need to make more frequent analyses of performance than if it were guided by an approach which depended on market structure for its results.

vides a basis for selection of those structural elements which are considered necessary for a "workably competitive" market.

Neither approach—structural or performance—can be applied without reference to the other. In an excellent reconciliation of structural concepts with performance considerations, Mason has advanced the following line of thought: the results expected from competition "may be paraphrased as efficient use of resources." Under a suitable set of technological and institutional conditions, the structure of perfect competition would be satisfactory in producing the expected results. Given, however, that technological and institutional conditions in our economy are not compatible with the structure of perfect competition, "there arises a problem of defining an acceptable kind of competition in terms of market structure such that it can normally be expected to be accompanied by the kind of performance considered acceptable in the use of resources. This is in fact the core of the difficulty of devising standards of public action in the antitrust field."¹¹ The definition of "workable competition" in terms of market structure is, therefore, ultimately necessary as a basis for effective governmental action. To quote Edwards:

1. There must be an appreciable number of sources of supply and an appreciable number of potential customers for substantially the same product or service. Suppliers and customers do not need to be so numerous that each trader is entirely without individual influence, but their number must be great enough that persons on the other side of the market may readily turn away from any particular trader and may find a variety of other alternatives.
2. No trader must be so powerful as to be able to coerce his rivals, nor so large that the remaining traders lack the capacity to take over at least a substantial portion of his trade.
3. Traders must be responsive to incentives of profit and loss; that is, they must not be so large, so diversified, so devoted to political rather than commercial purposes, so subsidized, or otherwise so unconcerned with results in a particular market that their policies are not affected by ordinary commercial incentives arising out of that market.
4. Matters of commercial policy must be decided by each trader separately without agreement with his rivals.
5. New traders must have opportunity to enter the market without handicap other than that which is automatically created by the fact that others are already well established there.

¹¹ Mason, *supra* note 6, at 1267.

6. Access by traders on one side of the market to those on the other side of the market must be unimpaired except by obstacles not deliberately introduced, such as distance or ignorance of the available alternatives.

7. There must be no substantial preferential status within the market for any important trader or group of traders on the basis of law, politics, or commercial alliances.¹²

Economic Meaning of "Injury to Competition"

Injury to competition occurs when competition is reduced or weakened; the damage need not amount to an elimination of all competition whatsoever. Thus the mere existence of competition in a market is no assurance that there has been no "injury to competition." In terms of the concept of workable competition, if the real alternatives in the market are increased, competition is improved; if the real alternatives are decreased, competition is injured. But reduction in the number of alternatives in the market is not, in itself, an indication of injury to competition, because the very process of competition involves a weeding out of alternatives that are inefficient or not wanted. If a reduction in alternatives occurs because of inefficiency in a firm or inadequate demand for its product, the vitality of competition—and not its injury—is indicated.

Furthermore, some degree of price discrimination, lack of knowledge, barriers to entry and exit, and inefficiency are to be expected in imperfect markets, and we cannot simply assume that a given effect on the market structure is due to any one of them, such as price discrimination. If a reduction in alternatives is due to inefficiency, the situation may not be improved by elimination of price discrimination which also happens to exist in the setting. We must make a judgment as to whether or not the price discrimination was one of the means responsible for the reduction in alternatives. Thus, not only the effects on market structure but also the means by which the effects took place must be considered as part of the concept of injury to competition.

Effects Involved in Injury to Competition

In terms of Edwards' standards of workable competition, and of the relative situation which would exist with and without the injury, a list of market effects, one or more of which would accompany an injury to competition, may be compiled:

1. Fewer alternative sources of supply or fewer potential customers for substantially the same product or service, where an appreciable number of alternatives do not remain.

¹² EDWARDS, MAINTAINING COMPETITION 9-10 (1949).

2. The enablement of a trader to coerce his rivals, or to be so large that remaining traders lack capacity to take over a substantial part of his trade.
3. Less responsiveness of traders to profit and loss incentives.
4. A greater area of agreement on commercial policy among rivals.
5. More handicaps on entry of new traders.
6. More deliberately introduced obstacles to access by traders on one side of the market to those on the other side.
7. A greater degree of preferential status within the market for an important trader or group of traders on the basis of law, politics, or commercial alliances.

In some cases, the presence of effects indicating possible injury to competition would be offset by other effects indicating that there was actually an improvement in competition.¹³ And it is quite possible for the current or proximate effects on competition to differ from the predicted or probable subsequent effects.¹⁴

The severity of effects will vary with the importance of the alternatives involved. The elimination, for instance, of one alternative out of a hundred in the market would not have any substantial effect on market competition unless that alternative were so large or unique that the remaining alternatives could not make up the gap in supply. At the other extreme, however, the elimination of one of two alternatives in the market—or any instance where all but one alternative is eliminated—would have a severe effect on competition. Competition itself would be eradicated.¹⁵ There is, of course, a continuum of possible situations beginning with one in which all competition would be eliminated, and ending with the situation in which the elimination of only one alternative has but an insignificant effect on the variety of available alternatives remaining. While the point at which the effect be-

¹³ For example, where an alert and aggressive competitor enters a market previously occupied by lethargic suppliers, his activity may result in the elimination of some of these suppliers, but also in a greater responsiveness of the remaining traders to profit and loss incentives.

¹⁴ The elimination of competitors may reflect active competition for a time, but if this results in the elimination of all competitors but one, competition itself is destroyed. Generally, where immediate effects differ from subsequent effects, controlling weight—for purposes of evaluation—should be given to the latter. Of course where ultimate effects are much more uncertain, this does not hold true. It should be remembered that we are not referring to a long-run static model, that change is cumulative, and that effects now deemed "subsequent" can themselves be superseded by still later effects.

¹⁵ Similarly, there would be a substantial effect on competition if all but one class of alternatives were eliminated, as where there are two broad classes of alternatives—such as cash-and-carry versus credit-and-delivery stores—and one class is entirely eliminated.

comes "substantial" cannot be located with precision, it is not unreasonable to expect general agreement on many—if not most—specific cases.

Price Discrimination as a Means by Which Effects on Competition May Occur

Whether or not the market effects discussed above reflect an injury to competition depends on the nature of the means by which the effects took place. Elimination because of inefficiency is clearly a case where the means generally rule out a valid finding of "injury to competition," and where, certainly, the effects are shown to be the result of competition. If, however, one of only two alternatives were eliminated from the market, and the means of elimination were the weeding out of an inefficient firm, and no new firms entered the market, this would be an example of injury to competition by competition itself.

The settings in which price discrimination takes place are not characterized by the impersonal, atomistic market of perfect competition, but frequently consist of only a few firms or include large firms or firms which operate in more than one market. By "few" firms, we mean a number such that the actions of at least some of them will be watched by the others, and that such actions, when observed, will be sufficient to result in offsetting actions by the others. Since price cuts are readily countered, open price cutting is not an attractive means of rivalry for such firms unless one of them believes that its share of the increase in the total market will make the price cut profitable. Otherwise each firm will seek to avoid open price cutting and will try rather to match the prices of its rivals. Thus there may be no alternative price offers available to firms on the other side of the market.

Firms may be large relative to the total market, or large relative to the size of their competitors. If a firm is large relative to the market, the remaining firms may lack the capacity to take over a substantial part of its trade, thus limiting the alternatives which are effectively available to firms on the other side of the market.¹⁶ A firm may be large relative to its competitors even though it does not constitute a large part of the total market. Such a firm may receive preferential treatment by suppliers, possibly because the aggregate of its trade is more valuable to suppliers, or because it is believed that the firm is likely to obtain such offers from other suppliers, or because the firm is large enough to produce for itself instead of purchasing. Such a firm

¹⁶ EDWARDS, *op. cit. supra* note 12, at 92-93.

may also be able to destroy or coerce its smaller competitors through price cutting, since the large firm would likely have a greater capacity to take the losses involved.

A large firm which operates in more than one market (geographical, product, or type of customer) may be able to destroy or coerce a less diversified competitor through selective price cutting limited to that competitor's market, not only because the large firm could stand greater losses, but also because the losses would occur in a smaller percentage of the more diversified firm's total market. Such behavior by a more diversified firm involves the use of price discrimination, but the existence of price discrimination does not necessarily mean that the firm is guilty of such behavior. Price discrimination may also result from a firm's seeking to maximize its profits in each of its markets when the demand elasticities differ among the markets.¹⁷ It might also be the result of promotional pricing of a new or improved product.

In the economic sense, price discrimination exists when the prices given by a seller to buyers or classes of buyers do not vary in a way corresponding to differences in the costs of supplying the various buyers or classes of buyers. Thus it is possible for discrimination to occur, not only among customers buying like goods at the same time, but also among customers buying unlike goods and among customers buying at different points in time. Where a multiproduct firm faces different demand elasticities in its product markets, price discrimination in the economic sense would result from the firm's taking account of the demand elasticities in pricing the individual products. Furthermore, the elasticity of demand for any given product might vary through time, and price discrimination would result from recognition of this variation in the price charged for the product at different points in time. Such time variation might be reflected by the use of seasonal discounts or off-peak rates.¹⁸

Price discrimination may injure competition at the "primary level" (between the seller granting the discriminatory price and his competitors), at the "secondary level" (between the recipient of the discriminatory price and his competitors), at the "tertiary level" (between the customers of the recipient of the discriminatory price and their competitors), or at more than one level. It is also possible that price competition will not injure competition at any level. The various

¹⁷ See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 142-43 (1958).

¹⁸ Legally, price discrimination relates only to like goods, and refers to discriminatory price differences, not discriminatory price similarities. Furthermore, price changes are allowed "from time to time where in response to changing conditions affecting the market." Robinson-Patman Act (Price Discrimination) § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

types of price discrimination must be considered in terms of whether or not they can serve as means of injury to competition.

(a) *Types of Price Discrimination Not Serving as Means of Injury to Competition*

Sporadic and unsystematic price discrimination, unless it is predatory, will not substantially injure competition at any level. While a choice customer may be taken away from a trader by a discriminatory raid, if the discrimination is not persistent and if the trader is not eliminated from the market, he can regain the customer at a later date by means of a similar raid. Price discrimination of this type is evidence of the price adjustment mechanism in a typically imperfect market, reflecting the pattern by which price changes filter through the market, or even the experimental testing of alternatives to the existing price level. In "orderly" markets of only a few sellers, price discrimination may even be the most effective means by which the forces of competition may be expressed.¹⁹ The secret price concession and the selective meeting of competitive price concessions—both of them price discriminations—by ultimately creating pressure on the unfavored buyers, might be the most likely way of forcing a general reduction in the price level of such a market. In this case, the bargaining skill and power of some of the buyers, while temporarily a disadvantage to the others, could ultimately serve to benefit other buyers in the market.²⁰

Even permanent and systematic price discriminations of certain types may not serve as means of injury to competition. Trade discounts might be discriminatory and yet have no effect on competition at the secondary level, if there is no competition among the trade classifications.²¹ Price discrimination among market segments at the ultimate consumer level could not result in injury to competition at the secondary level, since the segments would not be in competition with each other. Prices based on value in different uses are generally discriminatory, but there is seldom competition among the uses so classified. Neither could these types of price discrimination injure competition at the primary level, unless used by a diversified marketer to discipline, repress, or eliminate specialized competitors through se-

¹⁹ See McGee, *Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case*, 23 U. CHI. L. REV. 398, 400-03 (1956).

²⁰ *Id.* at 404.

²¹ Even in this case, however, such discounts may affect competition between direct and indirect buyers. For example, a direct-buying retailer may be given a lower price than a wholesaler who supplies other retailers in the same market area. There is no competition between the trade classes at the secondary level, but competition between the direct-buying retailer and the wholesaler's customers may well be affected by such trade discounts.

lective attack, or as part of a standardized structure with the purpose of facilitating an arrangement not to compete in price.

Price discrimination may also be promotional, with the purpose of introducing new or improved products, becoming established in a new market, or enlarging the market for products with large overhead costs. In these cases, competition is improved by the increase in number and variety of alternatives. Enlargement of the market for products with large overhead costs would make for fuller use of resources, but it is well to note that the output may be smaller as well as larger with price discrimination than without.²²

(b) Types of Price Discrimination Capable of Injuring Competition at the Primary Level

Opposite in effect to promotional price discrimination is the case of predatory price discrimination, designed to kill off or repress rivals of the seller, or at least bring them to terms. This is the case of "competition to establish a monopoly,"²³ where, if successful, there is an eventual reduction of the market alternatives at the primary level. Thus predatory pricing at less than full cost is followed by a return to full-cost pricing²⁴ in a market that may be characterized by less intense competition because some of the alternatives to buyers were eliminated by the predatory practice. While price cutting would be desirable if its purpose were promotional (to enlarge demand), it would be a possible means of injury to competition if its purpose were predatory (to restrict supply). Predatory or repressive price cutting may involve geographical discrimination when used by a widespread firm against localized competition, may involve discrimination among different kinds of products when used by a product-diversified firm against product-specialized competitors, or may involve "pricing by use" when used by a market-diversified firm against market-specialized competitors.

²² "If at the simple monopoly price the elasticities of demand are different in the two separate markets, the marginal revenue obtained by selling a unit of output in the market in which the elasticity of demand is lower will be less than the marginal revenue obtained by selling a unit of output in the more elastic market; and it will pay, when discrimination becomes possible, to cut down output and raise price in the less elastic market and to increase output and lower price in the more elastic market until the marginal revenue in each is the same. Output in one market is increased and in the other reduced, and it remains to discover whether the total output will increase or diminish when discrimination is introduced, or whether it will remain unchanged." ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 190 (1933). Whether total output is increased or decreased when the firm engages in discrimination depends upon a comparison of the concavities of the two demand curves facing the firm. *Id.* at 190-95.

²³ Copeland, *A Social Appraisal of Differential Pricing*, 6 J. MARKETING pt. 2, at 177, 179 (1942).

²⁴ See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 335 (1955).

McGee has argued that, while it is conceivable that a firm already possessing some degree of monopoly power might seek to increase its power by predatory price cutting, it would not pay the firm to do so. He states that since predation involves loss of some of the predator's own possible profits, merger or agreement is preferable at any price up to the discounted monopoly profits plus the loss of profit which would result from predation.²⁵ Based on his study of the practices of the predissolution Standard Oil Company, he concludes that Standard did not in fact use predatory discrimination but instead increased its market power through merger. McGee also doubts that predation would be used as a device for driving down the price at which competitors could be bought out, since this would be profitable "only when the process produces purchase prices that are so far below competitive asset figures that they more than offset the large losses necessary to produce them."²⁶

McGee's position that, in view of the possibility of merger, it would not pay a firm to engage in predatory price cutting, is not definitive. First, if predation is used in connection with a program of acquisition of competitors, the taking of the losses involved in actual predation will not be necessary in every case in which the policy is effective. The price at which smaller competitors could be bought out would be driven down by the very *threat* of ruin, if it appeared likely that the threat would be carried out. If the threat were carried out, it would result in losses to both predator and victim, and a competitor threatened with such losses might well sell out at a substantially lower price than it would otherwise accept. For the threat to be effective, however, it would be necessary for it to be carried out in at least some cases, resulting in the actual use of predatory price cutting for the purpose of showing the willingness of the predator to use it. How often it would actually be carried out would depend on the frequency of cases in which the prospective victim decided to risk the threat. Although few victims may be in evidence, a firm which chooses to risk the threat may still have a high probability of becoming a victim. And if the probability is high, the number of victims may still be small because so few firms decide to risk the threat.²⁷

A second reason for a firm to choose a predatory policy is that such a policy would discourage entry, while a policy of merger "at

²⁵ McGee, *supra* note 17, at 139-40, 143.

²⁶ *Id.* at 141.

²⁷ If many firms decide to risk the threat, however, the cost of the policy to the predator may be too great relative to the gains. It would be costly to invoke the policy in every case in which his threat is defied, but if the policy is not given effect often enough, the danger to an unsubmitive firm is too small to make the threat effective.

any price up to the discounted monopoly profits plus the loss of profit which would result from predation" would actually encourage entry of new firms. The fear of losses which would be imposed by a predatory rival would serve as an obstacle to the entry of new firms. The hope of being bought out at an attractive price, on the other hand, would stimulate the entry of new firms. Thus a firm in a position to pursue a predatory policy would achieve gains from such a policy that would not accrue under a policy of merger not involving the use of predation. Furthermore, there would be no need for the firm actually to suffer the losses of predation except on those occasions in which it was necessary to demonstrate the willingness to do so. The more certain the use of the predatory policy appeared to prospective entrants, the fewer the cases in which it would have to be carried out, and the lower the cost to the predator.

Price discrimination may also be associated with a joint pricing structure maintained with the specific purpose of avoiding competition in price at the primary level. Such a structure may be the result of formal or informal agreements among the participants. It may even exist in the absence of overt agreement if each firm, in the expectation of reciprocal behavior, is willing to forego the opportunity of diverting business by undercutting competitors' prices. In all these cases there is a need for some way of knowing what the price bids of competitors will be. A systematic method by which all firms arrive at some common delivered price provides both the necessary knowledge and also the assurance that the other firms will reciprocate. The smaller the number of firms in the market, and the greater the shared fear of the consequences of price competition, the greater the likelihood of participation in such joint pricing structures. These structures often result in geographical price discrimination; and where shipping costs are important, the sharing of more than one market by differently located competitors would almost inevitably require some price discrimination if a common delivered price were to be quoted in each market.²⁸ Thus, the possibility of price discrimination may facilitate the systematic suppression of price competition.

While it would be difficult to infer injury to competitors who choose to participate in joint pricing structures, the vitality of competition itself is injured at the primary level to the extent that such plans as basing-point and common zone-pricing arrangements are successful. Systematic freight equalization, except when used by a firm with disadvantages of location as a way of meeting competition,

²⁸ If a uniform delivered price were quoted, which did not differ among the shared markets, there would be no discrimination in the legal sense. Even here, however, there would be discrimination in the economic sense.

could also serve to eliminate price competition by producing identical delivered-price bids. There is the further possibility of injury to individual competitors who would prefer not to participate in joint pricing arrangements. Outsiders to the agreement might be forced into compliance or punished by selective joint pricing action of the group, or by other means.²⁹ This results in further injury to market competition in that those who prefer to compete in price are stifled. And the possibility of such selective pricing action may effectively exclude potential newcomers from the market.

The joint limitation of price competition is facilitated by use of common discount structures and terms of sale which are collusively maintained. Of course, common cash discounts, trade discounts, and quantity discounts, in the *absence* of a basic price arrangement, would not substantially injure competition at the primary level. In such a case, they would actually be beneficial in that they would make price comparison easier for buyers and price changing easier for sellers. When added to a basic price arrangement, however, such common discounts serve as means of perfecting and enforcing an agreement not to compete.

Competitive behavior may also be stifled by the independent price discrimination of a dominant firm. If such a firm has a policy of systematically holding customers by selective meeting of all competitive price bids, this policy would greatly diminish the incentive of competitors to offer such bids. Customers would hardly change to the new supplier in the absence of the price difference, and traders attempting to gain business from the dominant trader would find that the offering of lower prices would fail to achieve their purpose.

Even if the smaller firm were able to serve the customer at a lower price than the cost of the dominant firm, the latter could meet the lower price indefinitely if it were making offsetting profits in other parts of its market. While it is true that such a policy, when applied, would reduce the profit of the dominant firm, the suffering of reduction in profit would not be necessary in every case to make the policy effective. The reduction in profit would have to be incurred only in those cases where needed, and only so long as necessary, to demonstrate a willingness to apply the policy.

Large or diversified sellers may effect market exclusion by use of the volume discount. Based on total purchases over a period of time, it may reflect only savings which result from forward planning or stabilization of production made possible by the concentration of purchases with the company granting the volume discount. To the

²⁹ See, e.g., *FTC v. Cement Institute*, 333 U.S. 683, 710 (1948).

extent to which this discount is not a reflection of cost savings, however, it is a price discrimination. At the primary level, when used by a large or diversified supplier, it can foreclose a customer to competitors unless one of them is able to supply all the requirements of the customer. When the competitors of a large supplier are all small, they may never be able to expand their market beyond that of the smaller customers. These small competitors may seek part of the business of the larger buyers by granting discounts based on the total volume of their customers' purchases from *all* sources, including suppliers other than themselves. If, however, the larger supplier grants his volume discount only on purchases from his firm, and purchases from the smaller supplier reduce a customer's volume with the larger supplier to a lower discount bracket, then the smaller supplier would have to grant an additional discount to compensate the customer for any loss of discount on purchases from the large supplier. In the same way, a less diversified supplier, in order to get business, might have to give both a discount based on total purchases from all suppliers and an additional discount to compensate customers for loss of higher bracket discounts that would have been obtained by concentrating all purchases with a more diversified competitor.

A competitive supplier who grants such discounts in an effort to obtain part of a buyer's trade bears a burden greater than that of simply meeting a low price. In order for such a supplier to realize a unit price as high as that received by the former supplier, he must obtain all of the trade previously awarded to the other supplier—assuming, of course, that the reduction of volume with the old supplier results in the buyer's being placed in a lower discount bracket. If only part of the trade were transferred to the new supplier, the price obtained by the new supplier on the transferred business could be substantially less than that previously obtained by the old supplier—even though the customer has received no net reduction in total amount paid to both suppliers.³⁰

³⁰ To illustrate with a simplified example, let us assume that a customer has been buying 100 units (not necessarily of the same product) per time period from a supplier with a list price of \$10 per unit, and a cumulative volume discount schedule as follows: 100 units or more—20% discount; 90 to 99 units—15% discount; 80 to 89 units—10% discount; and 70 to 79 units—5% discount. If a potential supplier is so small or specialized that he can supply the customer only 20 units, or can get the customer to buy only 20 units from him, he cannot obtain this business by simply offering a price of \$10 less 20%, or \$160 for the 20 units. This is because the customer would, as a result of the transfer of business, be dropped from the 20% discount bracket to the 10% bracket on the 80 units still bought from the old supplier, and thus would lose 10% on the 80 units bought from the old supplier, a loss of \$80. Therefore, the new firm would have to make a price on the 20 units of no more than \$160 less \$80, or \$4 per unit, to obtain business on which the former supplier received a price of \$8 per unit. Only by getting all of the customer's business from the former supplier could the potential supplier obtain a price as great as that received by the firm which had been supplying the customer at \$8 per unit.

Thus the volume discount makes diversion from one source of supply to another more difficult than it otherwise would be—an effect heightened by any factor that makes the transfer of *all* of a buyer's business less feasible.³¹ Although a diversified supplier might take the gains resulting from his advantage in part of his line by simply charging more for those items where the advantage holds,³² he would rather "tie" his entire line together with a volume discount and thus render the items as to which he has an advantage less vulnerable to the competition of entrants. Only by supplying the entire line would such entrants achieve profits comparable to those of the established supplier. Thus the volume discount may serve as an effective barrier to entry.³³

(c) Types of Price Discrimination Capable of Injuring Competition at the Secondary and Tertiary Levels

Price discrimination may represent the conscious policy of a strong seller at the primary level attempting to make competition at the secondary level more to his liking. Machlup has pointed out that favoritism to large buyers may create a more monopolistic position for the seller's chief customers, thus increasing the prices obtainable through them, and may also be used to control policies of customers, by granting discounts and concessions only to those who go along with arrangements that limit the intensity of competition.³⁴ Such practices, if successful, clearly result in effects constituting injury to competition at the secondary level.

Zone and basing-point price arrangements may result in injuring competition at the secondary, as well as the primary, level. To the extent that fabricators are collusively denied the right to bargain for cost advantages due to their location relative to sources of supply, and to the extent that they compete with firms that are not similarly denied, they are penalized. If markets at the secondary level are highly local, as is generally true of the cement market, there may be no significant degree of favored status among the competitors in any

³¹ For instance, a potential supplier may be less diversified than the old supplier, and therefore less able to meet all the buyer's needs; or the new supplier's output may be too small to supply the buyer's requirements; or the old supplier may have patents on part of his line. Where capital required to produce one part of the old supplier's line is much greater than that needed for other parts, the potential supplier may not be able to commence production of the high capital goods. Finally, a buyer would obviously be more hesitant to transfer all of his business than he would be to divert some small part of it; the potential supplier's superiority in a few items might not justify a transfer to his entire line.

³² It has been contended that such a supplier does not need a tying mechanism in order to reap these gains. See Director & Levi, *Law and the Future: Trade Regulation*, 51 Nw. U.L. Rev. 281 (1956).

³³ See Brooks, *Volume Discounts as Barriers to Entry and Access*, 69 J. POL. ECON. 63 (1961).

³⁴ MACHLU, THE POLITICAL ECONOMY OF MONOPOLY 151-52 (1952).

given local market. If, however, markets at the secondary level are national, as is generally true of the candy market, a favored status among the fabricators could injure competition at that level. This injury would occur if the survival and relative size of the various firms were influenced to a substantial degree by the discrimination in price. Systems where prices to different locations do not vary with the costs of serving the locations may also set up additional barriers to the entry of new fabricators at locations which are penalized by the system. There is thus an interference with the allocation of productive resources to the lower real cost locations.

Quantity discounts, volume discounts, and other selective price concessions, to the extent that they exceed the cost savings associated with serving the beneficiaries, can injure competition at the secondary or tertiary level when there is a substantial group of buyers at that level who are too small to take advantage of the discount, or who are systematically denied the concession.

Similar to the *giving* of a discriminatory price for predatory reasons at the primary level, the *receiving* of a discriminatory price advantage may be used in a predatory manner at the secondary or tertiary level. This may be accomplished simply by the passing on of the saving to the beneficiaries' customers. If not passed on in the form of price reductions, the discriminatory advantage may indirectly eliminate competitors through increased sales effort or expansion of facilities on the part of the favored firms. The ultimate consumer will be benefited, at least for a time, by the increased competition and possible lowering of prices. If, however, this subsequently results in elimination of that class of firms which did not receive the lower discriminatory price, the final result may be a reduction in competition at the secondary level and a reduction in the variety of alternatives available in the market. It is, of course, also possible that an adequate variety of alternatives will still remain and that the remaining firms will be highly competitive. If this happens, and if at least some of the remaining firms in each market continue to compete by passing on their cost savings, there will be no injury to competition in the broad sense. The test of adequacy of alternatives in the secondary line is not variety of buying practices, but variety of reselling practices. There is some likelihood, however, that the surviving firms will raise prices if the reduction in the number of competitors results in a market of few sellers. Price competition might be replaced with nonprice promotional effort.³⁵ While ease of entry would serve to keep prices low, and this factor must be evaluated, the readiness of an established firm

³⁵ See Stocking, *The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust*, 44 GEO. L.J. 1, 47 (1955).

to pursue a predatory policy when entry is attempted would itself serve as a barrier to entry.

Let us now consider an additional result at the secondary level—a distortion of the allocation process. It is granted that if less-than-full-cost pricing is sporadic or is available to all on the same basis, then there could hardly be a substantial injury to competition at the secondary or tertiary levels, and the competitive process of weeding out the inefficient and unwanted firms could proceed. If, however, such special prices are systematically limited to only a part of the competitors at the secondary level, a persistent handicap unrelated to efficiency is placed on the unbefited part of the market, and this handicap destroys the validity of the subsequent competitive process as a means of eliminating the inefficient and unwanted firms.

In the case of a firm selling more than one product—a common case in the distributive fields—it is unlikely that a cost-of-goods handicap on one item alone would have a substantial effect on survival of the firm. Nevertheless, such a handicap will influence the profitability of the particular item involved, and thus might lead the firm to withdraw as a supplier of that item, thereby reducing the variety of alternative sources for that particular product. Furthermore, if the firm is handicapped in its cost of goods on one item, it is not unlikely that similar conditions in the market for other items of its line would produce similar handicaps in other items that it sells. Thus, it might be found that a discrimination on a minor item is typical of the situation pertaining to a substantial proportion of the firm's total business.

But it is also quite possible that, on an overall basis, the price discriminations are offsetting rather than cumulative. For example, with manufacturers located in different geographical areas, and buying component parts from suppliers who are also scattered geographically, it might be found that a given manufacturer's cost advantage on some components would be substantially offset by cost disadvantages on other components. Or it might be found in a disorganized market that a given buyer's preferential cost treatment from one supplier was offset by comparable preferential treatment given by other suppliers to the given buyer's competitors. In cases such as these, the net effect of the price differentials would be the same as the effect if the offsetting differences were eliminated, and there would be no gain from such elimination. If only part of the offsetting differences were eliminated, net preferential price advantages might be introduced where none existed before.

On the other hand, in cases where the cost differences on various items are cumulative rather than offsetting (as would be true if large

firms generally received unjustified preferential price treatment or if firms in certain locations generally received such preferential price treatment, with no offsetting disadvantages on cost prices of other items), then the net effect of the cost differences is quite different from the effect which would exist if the differences were eliminated. Furthermore, if only part of such differences were eliminated, there would be a partial gain to the extent that the cumulative differences were reduced.

Where discrimination in the extension of price concessions is of the cumulative type, favored firms might survive which would otherwise be eliminated because of inefficiency, and unfavored firms might be eliminated which would otherwise survive. This would also be true if cost savings at the prior level were systematically withheld from a class of firms whose method of business made the cost savings possible.

There are, of course, many situations which, considered from the standpoint of the firm, call for a policy of selective price cutting, providing marginal costs are being met. While this may be "good business" for the firm, it does not change the fact that such a practice may result in injury to competition at the secondary or tertiary level. Just as "injury to a firm" does not necessarily involve "injury to competition," a practice which is good for a firm is not necessarily also good for competition.

Economic Methods of Determining "Injury to Competition"

Since injury to competition in the economic sense involves market effects which result from certain means, both the nature of the means and the nature of the effects must be considered in determining whether or not injury has occurred or is likely to occur. Our discussion is necessarily confined to those cases where price discrimination is involved, since only such cases are covered in enforcement of the Robinson-Patman Act.

If a case of price discrimination were established, an inference of injury to competition in the economic sense would be possible only if (1) it were a type of price discrimination capable of injuring competition, and also (2) there were one or more actual or probable effects associated with injury to competition.

Determining Type of Price Discrimination

Of the types of price discrimination capable of being means of injury to competition, it is relatively easy to determine the existence of quantity discounts, volume discounts, or systematic selective price concessions to large buyers or to buyers agreeing to arrangements that

limit the intensity of competition. It is much more difficult to distinguish predatory price discrimination, which may be confused with promotional price discrimination. To make this distinction, Machlup has suggested first asking the question: Does the price cutter expect his additional business "to come from one or two particular competitors who would not be able to stand the loss of clientele, or is it to come from a larger number of competitors, each of whom would not suffer badly enough to be forced out of business?"³⁶ In the latter case, there would be no justification for the discrimination from a predatory standpoint, and this would suffice to classify the price cutting as promotional. To answer Machlup's question, we could look at the breakdown of customers among the favored and unfavored groups. If the classification is on the basis of differences in the demand elasticities of the customers, the discrimination is probably promotional.³⁷ If, instead, the classification is on the basis of the few specific suppliers that are available or likely to become available to the customers, then the discrimination is probably predatory. Thus, discrimination among territories may be predatory when used by a geographically widespread firm against localized competitors, and discrimination among products may be predatory when used by a multiproduct firm against specialized competitors.

The fact that specific suppliers are likely to be eliminated is insufficient, by itself, to classify a discrimination as predatory in intent. In some cases the classification of favored customers may be on a basis which could indicate either predatory or promotional discrimination. The promotion of a new or improved product may, merely as a side effect, mean the elimination of firms which produce the superseded product. Predatory price cutting is indicated in such cases only when the firms being eliminated are selling products which—in the eyes of the market—are not inferior to the product of the price cutter.

In connection with local price cutting, Rose has said: "Recoupment would be a sure-fire indication of intent . . . to create either a monopoly or an unreasonable restraint of trade."³⁸ Discriminatory price cutting involves recoupment in the sense of the term as used by Rose, for it is his position that the greater profits in the higher-price area help to subsidize the price cuts. It is incorrect, however, to use local price cutting per se as a test of predatory intent. It may simply reflect differences in demand elasticities among the local markets

³⁶ Machlup, *Characteristics and Types of Price Discrimination*, in BUSINESS CONCENTRATION AND PRICE POLICY 426 (1955).

³⁷ It may be that the basis was that of possible or anticipated differences in demand elasticities which did not actually exist. This "exploratory" discrimination is clearly promotional in intent, even if not promotional in result.

³⁸ Rose, *The Right of a Businessman To Lower the Price of His Goods*, 4 VAND. L. REV. 221, 231 (1951).

served by a firm.³⁹ It should also be pointed out that the cutting of prices in one market does not necessitate "recoupment" in the sense of raising prices in other markets. As Adelman has written, "It would be a strange businessman who was able to raise prices to buyer X, but waited until he lowered them to Y."⁴⁰

While the cutting of prices in one market does not cause or imply the raising of prices in other markets, the enjoyment of higher prices in other markets will facilitate the employment of predatory price cutting in markets where more competition is faced. True, the predation would not be justified on the basis of the profits in the other markets, but simply on the basis of the greater future profits expected from the elimination of competitors in the market where the predation occurs. Nevertheless, a program such as this cannot be successful unless the predator is able to stand his losses longer than the victim can stand his. The ability to stand losses depends on the resources of the firm and on the profits being made by the firm in other markets. Discrimination among markets thus can facilitate a predatory program, but, on the other hand, a firm with adequate resources does not need to discriminate in order to engage in predation. The success of a predatory program, of course, also depends on the existence of barriers to entry, but the knowledge that an existing firm is ready to engage in predation, and that such predation would inflict losses on the victim, would itself serve as a barrier to entry.

The distinction of predatory pricing from the simple response of a firm to differences in demand elasticities must be based on an evaluation of whether any difference in demand elasticities in itself has been sufficient to justify the difference in price. If a firm which had initiated a local price cut was found to be making an increased short-run profit as a result, this would indicate a wise response of the firm to the demand curve with which it was confronted in the market. If it made a decreased short-run profit as a result, however, and yet persisted in the price cut, the explanation for its behavior would have to be an attempt to change the demand curve which it faced.⁴¹ Even if the

³⁹ See McGee, *supra* note 17, at 142-43.

⁴⁰ Adelman also points out that a price reduction may come from a reduction in costs, use of excess capacity, or out of profits. Adelman, *supra* note 7, at 1331.

⁴¹ Circumstances might exist in which this test would yield no clear verdict. One problem is that, over time, factors other than changes in price might affect profits, thus making it difficult, or even impossible, to determine whether the price change by itself had made profits higher or lower than they would otherwise have been. For example, declining demand might cause both a price cut and also a fall in profits, and it would be an error to infer from this that the price cut resulted in profits being lower than they would otherwise be. In other circumstances, however, there might exist strong support for an inference as to the effect of a price cut on profits. If, following a price cut, profits changed and no other factors which might cause a similar change were apparent, it would be reasonable to make an inference that the profit effect was the result of the price cut.

latter inference were made, however, it would be necessary to distinguish promotional intent from predatory intent. A further inference would have to be made as to whether the change in the firm's demand curve was expected as a result of a change in the market demand curve or of a reduction in the extent of competition.

Another type of price discrimination difficult to determine as such is the systematic avoidance of price competition by means of arrangements like the basing-point or zone-pricing systems. Adherence to such arrangements may be confused with a firm's simply meeting a competitively determined price. To make this distinction, the question might be asked: "Does the exact meeting of prices at all points served result in the firm's consistently losing a substantial amount of business which would be more profitable than that which is gained by the practice?" Thus, if a new mill in a deficit area sells in that area at the delivered price which is quoted by the older competition, there is no giving up of more desirable business by this meeting of the delivered price. If, however, the new mill consistently absorbs freight in order to meet prices and make sales in the direction of the older mill, and at the same time is losing a substantial amount of nearby business because it is only "meeting" and not "beating" the delivered price of competitors, the new mill is then—by its practice of exact price meeting—losing nearby business with a higher mill net than that of the more distant business which is gained. The persistence of this situation is difficult to explain except in terms of a desire to avoid price competition entirely. If the latter situation exists generally, it is a systematic expression of a general desire to avoid price competition, and any price obtaining in the market could hardly be called a "competitive" price.⁴²

While part of a firm's behavior under a noncompetitive system would usually be equally explainable as identical with competitive behavior, the doubt is resolved if other parts of the firm's behavior are not explainable in terms of competitive behavior. In such a case, it is reasonable to infer that the competitive impulses of the firm were sacrificed in order to achieve the overall advantages of a noncompetitive system. The general and systematic existence of such a situation

⁴² "In the conspiracies that use basing point formulas, the flow of goods in the market also tends to be different from the flow that might be expected under competition. Actual competitive markets . . . usually show a certain amount of cross-hauling; it is impracticable in most cases for each buyer to turn to the nearest producer and each producer to the nearest buyers. Nevertheless, there is a tendency under competition for wasteful forms of cross-hauling to be held to a minimum. Goods flow readily from areas of surplus production to areas of deficit production, but there is not much flow from one deficit area to another or from one surplus area to another. There is very little flow indeed from deficit areas to surplus areas." Edwards, *Delivered Prices: Doing Business Under the Present Law*, 47 MICH. L. REV. 743, 749-50 (1949).

would be indicated by a negative answer to the question: "Does a seller, having quoted a price, have any reason to fear that he will lose the order because of a lower price quotation by a competitor?" Another important distinction is in the way suppliers react on those occasions when their competitors do *not* do what is expected. In a noncompetitive arrangement, an inconsequential difference in price is regarded as a serious matter and generates considerable activity on the part of executives to remedy the "situation" by approaching the price cutter.⁴³ In competition, inconsequential price differences are generally not taken too seriously, and the remedy lies in changes in the policies or prices of the competitors of the price cutter.

Uniformity of prices in a market is not a test per se, for it may be the result of either competition or collusion. Edwards has pointed out, however, that the reason for the uniformity may be determined by reference to the rigidity of the prices and by the way the prices move relative to each other.⁴⁴ While under competition the prices may be uniform for a time, they do not show continuous and rigid uniformity like that of a collusive pattern. Furthermore, under competition, recurrent price differences, as well as similarities, occur because of differences in predictions of trend and estimates of demand elasticities among the markets served by various suppliers. In basing-point conspiracy, however, the base mill has an automatic right to price leadership, and everyone else is expected to follow the base mill.⁴⁵

Determining Effects on Competition

The determination of "injury to competition" implies a relative evaluation of the competitive situation with and without a given act or practice such as price discrimination. Rather than the more difficult—and more debatable—problem of determining to what extent a given type of competition exists, the problem here is one of whether or not the forces of competition are improved or injured. Generally speaking, in terms of workable competition, if the real alternatives in the market are increased, competition is improved; if the real alternatives in the market are decreased, competition is injured—giving due allowance, of course, for the competitive process of selection whereby the inefficient and undesired alternatives are eliminated.

If the proximate effect on competition differs from the consequent effect, the consequent effect will generally be more important. The possibility of such a difference in the effects through time must be

⁴³ *Id.* at 751-52.

⁴⁴ *Id.* at 746.

⁴⁵ *Id.* at 751.

considered in the analysis, and an evaluation of relative importance must be made.

On the basis of the earlier discussions of the meanings of competition and injury to competition, with particular reference to the concept of workable competition, determination of whether or not injury to competition is taking place in a market would involve answering, at the primary level and separately at the secondary and tertiary levels, the following questions:

1. Does the price discrimination result, or will it result, in the elimination of a substantial alternative or group of alternatives in a market for substantially the same product or service?
2. Does the price discrimination result, or will it result, in an important rival or group of rivals substantially limiting their competitive activities in order to appease, come to terms with, or avoid or lessen price warfare with a firm granting or receiving the discrimination? Does it result, or will it result, in a trader being so large that his rivals lack capacity to take over a substantial part of his trade?
3. As a result of the price discrimination, is there, or will there be, a substantial trader or group of traders who are less responsive to profit and loss incentives?
4. Does the price discrimination facilitate, or will it facilitate, an arrangement which substantially limits the extent of price competition among rivals?
5. As a result of the price discrimination, is it, or will it be, substantially more difficult for new traders to enter the market?
6. Does the price discrimination substantially reduce access by important traders or groups of traders on one side of the market to important traders or groups of traders on the other side of the market, or will it have this effect?
7. Does, or will, the price discrimination substantially implement a preferential status for an important trader or group of traders on the basis of law, politics, or commercial alliances?⁴⁶

There may be disagreement as to how important the affected firms were, and whether the reduction in alternatives was substantial or not. This determination would not necessarily be difficult, how-

⁴⁶ While one or more of these effects may be readily apparent in some sets of facts, in other cases there may be alternative explanations of the evidence. In such cases, one might proceed in the determination of these questions by asking the further question: "Is there reason for the price discrimination to have this effect on the trader?" If the answer is affirmative, one could then ask: "Are there any additional facts or relationships which would accompany this effect, but which would not otherwise exist?" The presence of such additional facts or relationships would constitute a relatively solid ground for decision.

ever, for many cases would be such that the firms involved would either be clearly important, or else insignificant, in the market.

If other possible causes, such as inefficiency, cannot be shown, and the presence of a discrimination capable of injuring competition can be shown, this—if accompanied by one of the effects listed above—would constitute as much basis as could logically be found for a determination of injury to competition.

LEGAL APPROACH

Legal Meaning of Competition

The word "competition" was added to the statute law by the Clayton Act, which prohibited certain business practices such as price discrimination where the effect might be "to substantially lessen competition or tend to create a monopoly in any line of commerce."⁴⁷ Since the Clayton Act did not supply an independent definition of the term, its meaning as a legal concept was based on the older concepts of "restraint of trade" and "monopolization," which were found in the Sherman Act: "competition" as a word of art comprehended a market place wherein no trader was limited in his actions by agreement or by the predatory tactics or repressive power of his rivals. In 1936 the Robinson-Patman Act added a new gloss—in addition to the concept of general competition, it embodied a less expansive view, namely *competition with a firm or its customers*.⁴⁸

⁴⁷ The Clayton Act also added the element of future probability to the law since, to prohibit a practice, it did not require the actual occurrence of the undesired effect, but merely the possibility or probability of the effect. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945).

⁴⁸ "The discriminations prohibited by this bill are those whose effect may be: 1. Substantially to lessen competition in any line of commerce; or, 2. To tend to create a monopoly in any line of commerce; or, 3. To injure, destroy, or prevent competition: (a) With any person who either grants or knowingly receives the benefit of such discrimination; or, (b) With customers of either of them (*i.e.*, the grantor or grantee). Effects 1 and 2 above correspond to those required to be shown under the old § 2 of the Clayton Act. Generally speaking, they require a showing of effect upon competitive conditions generally in the line of commerce and market territory concerned, as distinguished from the effect of the discrimination upon immediate competition with the grantor or grantee. The difference may be illustrated where a nonresident concern opens a new branch beside a local concern, and with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed. The present bill is, therefore, less rigorous in its provisions as to the effect required to be shown in order to bring a given discrimination within its prohibitions." 80 CONG. REC. 9417 (1936) (remarks of Congressman Utterback). Note that a crucial difference between effects 1 and 3 is that effect 3 does not allow evaluation of possible offsetting gains for competition (in general) which accompany the lessening of competition with the grantor or grantee of the discrimination. Thus effect 1 is more in harmony with the economic meaning of competition.

Early enforcement of the Robinson-Patman Act indicated that competition is considered as involving two or more independent firms actively attempting the sale of the same kind of merchandise to the same prospective purchasers,⁴⁹ and that the existence of alternatives to buyers in terms of "products of like grade and quality" is an implicit condition of competition.⁵⁰ In *FTC v. A. E. Staley Mfg. Co.*,⁵¹ the Supreme Court observed that the act placed an "emphasis on individual competitive situations, rather than upon a general system of competition." This difference in emphasis distinguishes the concepts of "general competition" (market-wide competition in a line of commerce) and "immediate competition" (competition with a specific competitor).⁵²

Legal Meaning of Injury to Competition

Although the phrase "to injure competition" did not appear in a statute until passage of the Robinson-Patman Act in 1936, the concept of injury to competition had been an important aspect of litigation under both the Sherman and Clayton Acts.⁵³ When the Clayton Act was written, Congress had in mind predatory geographical price discrimination—such as that generally believed to have been used by Standard Oil to bring its competitors to terms. At first it was held that the act applied only to injury at the primary level,⁵⁴ but later the Supreme Court interpreted its provisions as applying to the secondary level as well.⁵⁵

The wording of the Robinson-Patman Act left no doubt that it was intended to apply not only to the primary and secondary levels but also to the tertiary level ("or with customers of either of them"). Thus there are three legal standards under the Robinson-Patman Act: (1) lessening of competition in any line of commerce; (2) tendency to create a monopoly in any line of commerce; and (3) injury, destruction, or prevention of competition *with* any person who either grants or knowingly receives the benefit of price discrimination, or with cus-

⁴⁹ National Numbering Mach. Co., 30 F.T.C. 139, 143 (1939).

⁵⁰ American Optical Co., 28 F.T.C. 169, 180 (1939).

⁵¹ 324 U.S. 746, 753 (1945).

⁵² An example of the application of the narrow concept of competition may be found in *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

⁵³ The terms "to monopolize" and "restraint of trade" in the Sherman Act were interpreted as meaning to unduly diminish competition. *Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911). Under the Clayton Act, the Federal Trade Commission found "injury to competition" in the "Pittsburgh-plus" system of pricing, on the ground that such discriminatory pricing substantially lessened competition. *United States Steel Corp.*, 8 F.T.C. 1, 29-30 (1924).

⁵⁴ *Mennen Co. v. FTC*, 288 Fed. 774, 779 (2d Cir.), *cert. denied*, 262 U.S. 759 (1923).

⁵⁵ *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245, 253-54 (1929).

tomers of either of them. The injury indicated in the first standard involves "competition in general" and is in accord with the economic meaning of injury. That indicated in the third is more restricted, concerning only groups of competitors, and is therefore less in harmony with a purely economic definition of competition. The injuries comprehended here are more personal: as a result of the discrimination, the injured firm is crippled in its struggle with one or more specific competitors.

In many cases there has been no distinction made among the three legal standards. In some Federal Trade Commission decisions, the findings are stated in the alternative, parroting the words of the statute.⁵⁶ Although differentiation has frequently been made between the third standard and the other two, the first two standards have seldom been distinguished—apparently on the assumption that if competition is lessened, there is a tendency toward monopoly.⁵⁷ On the other hand, there is some indication that, in applying the statute, the Court and the Commission require a greater effect to sustain a finding of injury at the primary level than is necessary for such a finding at the secondary level.⁵⁸

The Scope of the Legal Approach to Injury

Under the economic concept of price discrimination, there could be discrimination against customers who buy in December as opposed to customers who buy in January, and there could be discrimination against customers who buy electric typewriters as opposed to those who buy nonelectric models. In the legal approach, however, these types of discrimination are not prohibited, since the law concerns price differences in "commodities of like grade and quality,"⁵⁹ and provides

⁵⁶ See, e.g., *Page Dairy Co.*, 50 F.T.C. 395, 398 (1953): the effect "may be to substantially lessen competition or tend to create a monopoly . . . or to injure, destroy, or prevent competition with . . ."

⁵⁷ But see *E. Edelmann & Co.*, 51 F.T.C. 978, 993-94 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958): "As for 'tendency to create a monopoly,' the doctrinaire approach regards this as an inevitable *sequitur* of any substantial lessening of competition. However, in the setting of this case, the Hearing Examiner construes this phrase to mean that the probable result of the discriminatory pricing practice found will be such a concentration of economic power in the price-favored as will enable them to affect substantially the market in which they sell, if not to dominate and dictate the commercial acts of the unfavored. The record here fails to establish this."

⁵⁸ Compare *FTC v. Morton Salt Co.*, 334 U.S. 37, 48-49 (1948), and *H. C. Brill Co.*, 26 F.T.C. 666, 680 (1938) (secondary level), with *FTC, Statement of Federal Trade Commission Policy Toward Geographic Pricing Practices for Staff Information and Guidance*, in *BROWN, JEUCK & PETERSON, MARKET ORGANIZATION AND PRICE POLICIES* 347-48 (1952) (geographic discrimination at primary level).

⁵⁹ In *Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, 290 (1936), technical grades were relied on in determining whether commodities were of "like grade and quality." In *Standard Oil Co.*, 41 F.T.C. 263, 281 (1945), *modified and aff'd*, 173 F.2d 210 (1949), *rev'd*, 340 U.S. 231 (1951), the Commission indicated that "equal public acceptance" is a criterion of like grade and quality.

that "nothing . . . shall prevent price changes from time to time where in response to changing conditions affecting the market . . ." Thus price discrimination in the legal sense is limited as to both commodity and time. Even if this were not so, however, it is doubtful that price discriminations through time could result to a substantial degree in injury to competition, or even in substantial injury to individual competitors.⁶⁰ Since all customers would have the privilege of choosing the time of purchase, only chance, ignorance, or choice would cause a given customer to buy on a higher-price market. Furthermore, the amount of competition between markets separated by time is small compared to that within such markets. Thus relatively little would be gained by broadening the legal scope of injury as to time. In fact, such a change would not allow sellers to use price changes as means of adjusting production to fluctuations in demand. It is not only much more workable to limit the legal scope of injury as to time, but it is also advisable on economic grounds. A similar conclusion must be reached with respect to the desirability of broadening the legal scope of injury in terms of commodity: attempting to discover whether such discriminations exist would involve expensive—and inconclusive—cost analyses.

The scope of the legal approach to price discrimination has also been limited in that injury to competition has been found only in connection with discriminatory *differences* in price, and not with respect to discriminatory *similarities* in price. Legally, "price discrimination" has been equated with "price difference."⁶¹ Thus a firm does not violate the act if its prices are the same to all customers, even if the characteristics of some of the customers result in cost savings on sales to those customers.⁶² This situation results in economic discrimination, however, because prices do not always bear the same relationship to costs.⁶³

The Aspect of "Fairness" in the Legal Approach

While the legal concept of injury to competition is largely based on economic effects, there is an additional legal aspect that is not found in economics. It has been said that the legal approach is to seek equity

⁶⁰ Time discrimination could, however, injure competition if it were not announced generally, but were used *ad hoc* to cloak customer discrimination.

⁶¹ *FTC v. Morton Salt Co.*, 334 U.S. 37, 45 (1948) (establishing difference in price establishes discrimination).

⁶² *But cf. United Fence Mfrs. Ass'n*, 27 F.T.C. 377, 398 (1938), which held that a system of uniform delivered prices maintained by agreement inescapably leads to price discrimination because varying freight charges are not taken into account.

⁶³ A cost defense to a charge of price discrimination under the Robinson-Patman Act, if valid, indicates that the price differential did not injure competition economically but merely reflected the savings which the beneficiary's mode of operation made possible at the prior level of distribution.

in some cases regardless of economic impact,⁶⁴ and it is true that an element of "fairness" was purposely injected into the law of antitrust by the Robinson-Patman amendment to the Clayton Act: Congress was intent on protecting small businesses from the predatory tactics of larger competitors,⁶⁵ partly, it seems, simply for the sake of the small businesses themselves⁶⁶ and partly because the injuries suffered by individual firms as a result of such tactics were deemed to be proof that general competition was being eroded.⁶⁷

In some cases, such as predation, injury to competitors *would* occur along with injury to market competition; but in other cases, such as collusion, there might be no injury to competitors although market competition was virtually eliminated. In still other instances competitors might be injured while market competition was improved—as a result, for example, of promotional pricing on the part of a firm with a superior product. Since price discrimination can be illegal under either the statutory standard of "injury to competition with a competitor" or the broader legal standard of "lessening competition," the enforcing agency could hardly dismiss a case where either standard applied. But if it wished to bring enforcement into accord with an economic approach, it could limit its selection of cases for prosecution to those in which the broader, economic standard seemed to apply.

Diversion of trade has been used as the basis for findings of injury at both the primary and secondary levels.⁶⁸ At the primary level, such a basis—by itself—is clearly irrelevant to the concept of market competition, and its use could be justified only as pertinent to the legal standard of "fairness." At the secondary level, however, it is possible that diversion of trade resulting from price discrimination would also be indicative of effects injurious to market competition as well as to competitors.⁶⁹

Ignoring economics for the moment, "fairness" affords a better basis for enforcement when there is diversion of trade at the secondary level than it does when there is diversion at the primary level. First, it is a natural and common business aim for a firm to seek to divert

⁶⁴ DIRLAM & KAHN, FAIR COMPETITION 206 (1954).

⁶⁵ FTC v. Morton Salt Co., 334 U.S. 37, 49 (1948).

⁶⁶ 80 CONG. REC. 9416 (1936) (remarks of Congressman Utterback).

⁶⁷ "The . . . [Clayton Act] has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. *Only through such injuries, in fact, can the larger general injury result*, and to catch the weed in the seed will keep it from coming to flower." S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936) (emphasis added); H.R. REP. No. 2287, 74th Cong., 2d Sess. 8 (1936); 80 CONG. REC. 9417 (1936).

⁶⁸ See notes 131-41, 159-66 *infra* and accompanying text.

⁶⁹ See notes 175-76 *infra* and accompanying text.

business from its own competitors at the primary level, whether the means of accomplishing this aim be price discrimination or some other method of competition; but at the secondary level, the diversion of trade from one customer to another (particularly from a customer paying a high price to a customer paying a low price) is not at all a normal business aim. The natural desire of the seller is, in fact, to resist the granting of price concessions.⁷⁰ Thus, from the standpoint of "fairness," there is less tampering with natural and common competitive aims when discrimination is prohibited in connection with secondary level—as opposed to primary level—injury.

Second, while an injured competitor at the primary level can retaliate with similar action,⁷¹ an injured customer is unable to retaliate in kind against a discriminating seller. Often the injured customer is unable even to find another comparable source of supply, and is generally unable to get a better bargain by turning to alternative sources. If he lacks relative bargaining power against one supplier, he probably lacks it against all the others. Because an injured firm has less recourse outside of the law, considerations of "fairness" again make a more clear-cut case for legal action at the secondary level than at the primary level.

Economic Concepts Used as Bases for Legal Findings Regarding "Injury to Competition"

It was pointed out in the preceding section that the concepts involved in "injury to competition" were an important aspect of litigation under the Sherman Act. Prior to passage of the Robinson-Patman Act in 1936, standards or tests of violations under the earlier act consisted of extent of market control, method of acquiring control, manner of using control, and "intent." Extent of market control had seldom been used as evidence, however, since prosecuting attorneys were concerned with how best to sustain their case in court, and from this standpoint it was easier and more satisfactory to use tests of restrictive practices than it was to support a case based on tests of the degree of market control.⁷² This viewpoint was borne out by the fact that there had been evidence generally assumed to be indicative

⁷⁰ Among those happiest with the effects of the Robinson-Patman Act are the small manufacturers whose power to resist the demands of their large customers has been strengthened. See Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 19 (1953); Austern, *Tabula in Naufragio—Administrative Style*, in N.Y. ST. BAR ASS'N, ANTITRUST LAW SYMPOSIUM 105, 107-09 (1953).

⁷¹ Such retaliation is possible except in cases where there are large differences in the power or dispersion of the competitors at the primary level.

⁷² Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1272 (1949).

of predatory tactics in almost every section 2 Sherman Act case upheld by the courts.⁷³

In enforcement of the Robinson-Patman Act, as contrasted with the background of Sherman Act enforcement, the determination of injury is on the basis of effects, and the showing of intent is not required to prove a violation.⁷⁴ Another element which distinguishes enforcement of the Robinson-Patman Act from that of the Sherman Act is that an "expert" body has been provided to make the findings of fact, and these findings are generally accepted by the courts. Indeed, the Federal Trade Commission was originally designed as a body whose findings were conclusive if supported by "substantial evidence."⁷⁵ But the Supreme Court, in *FTC v. Gratz*,⁷⁶ soon made the courts the arbiters of fact. The original statutory design was subsequently reestablished by *FTC v. Algoma Lumber Co.*,⁷⁷ which forbade the courts to pick and choose from the record in order to make their own findings of fact.⁷⁸ Subsequently, the courts have "recognized that the Federal Trade Commission was created for the purpose of appraising economic data and market facts,"⁷⁹ and have held themselves not equipped, "either by experience or by the availability of skilled assistance," to appraise economic data.⁸⁰

⁷³ McGee doubts that there is much reason for a firm to engage in predation, and his study of the "classic example," the Standard Oil Company of New Jersey, led him to conclude that Standard did not in fact use predatory discrimination, but rather increased its market power through merger. See notes 25-26 *supra* and accompanying text.

⁷⁴ The problems created by "intent" as a test of predation are summarized by Wilcox as follows: "[T]he price cutter's purpose is known only to himself, is only to be inferred by others. In cases of flagrant discrimination the inference may be plain; in cases of general price reduction it is less so. The competitor who finds it difficult to meet another's price may well believe that his rival intends to eliminate him, but this conviction cannot be taken as sufficient proof of such intent. Every act of competition is designed to attract business to one competitor rather than another and, to that extent, to eliminate the latter from the market. The line beyond which such activity is to be denounced as predatory is not an easy one to draw." WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 6 (TNEC Monograph No. 21, 1940).

⁷⁵ See Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1343 (1948).

⁷⁶ 253 U.S. 421 (1920).

⁷⁷ 291 U.S. 67 (1934).

⁷⁸ Under the Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958), which directs the courts to set aside agency findings "unsupported by substantial evidence . . ." or "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court," the courts have been reluctant to review the facts of cases on appeal. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948): "The effective administration of the [Robinson-Patman] Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if . . . the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order."

⁷⁹ Howrey, *Economic Evidence in Antitrust Cases*, 19 J. MARKETING 119 n.4 (1954).

⁸⁰ Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1949).

Bases for Findings as to "Injury"⁸¹

In enforcement of the Robinson-Patman Act to June 30, 1958, there were 130 decisions of the Federal Trade Commission in which findings of injury were made, but in 62 of these decisions there was no statement of the evidence of injury, but simply the finding of a price difference among customers.⁸² And 75 cases were settled by an admission of the facts by the respondent or by consent agreement. In these cases, there was no introduction of evidence or testimony either in support of or in opposition to the complaint, and the findings—or lack of findings—cannot be given much weight. In such cases, the respondent agrees as to the nature of the effects, but only for settlement purposes, and there can be no certainty that the allegations of the complaints or the findings are actually true, or even that there is any supporting evidence.⁸³ These 75 cases, therefore, are not included in the following analysis.

In the 55 "contested" cases, there have been 46 commission decisions, 12 court decisions on appeal, and 1 commission report on the violation of an order, or a total of 59 decisions which have contained additional evidentiary findings which have served as legal bases for findings of injury to competition. Analysis of these 59 decisions indicates that they contained 80 individual instances of such additional findings of evidence. These supporting findings were of 11 types, falling into 4 broad categories.⁸⁴ The categories are:

⁸¹ All complaints, findings, opinions, and decisions of the FTC in those cases where findings as to "injury" were made were read and analyzed. Inasmuch as the primary concern of this Article is with the concepts of injury expressed by the Commission, the records of these cases were not analyzed and no attempt was made to pass judgment on whether the Commission properly evaluated the evidence. Similarly, in those cases which were appealed, the court decisions, but not the records, were read and analyzed.

⁸² On the question of evidence to support a finding of injury to competition at the secondary level, see *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) : "It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence." *Id.* at 50-51. (Emphasis added.) In *Morton Salt*, however, the Commission had made findings of additional evidence of injury. And in a more recent decision, the Commission stated that it "has very generally held, that under Section 2(a), counsel supporting the complaint has the burden of proof to establish the necessary competitive injury. Where that burden has not been sustained, the cases have been dismissed." *General Foods Corp.*, 50 F.T.C. 885, 890 (1954).

⁸³ See, e.g., *Sunshine Biscuits, Inc.*, 52 F.T.C. 110, 114 (1955).

⁸⁴ In analyzing the findings, "formal" findings which merely followed the wording of the act were not considered, inasmuch as findings phrased in this manner are common to all cases and give no indication of the type of evidence underlying to any particular case. It should also be noted that even those findings which did not follow the wording of the act were often made up of stock phrases with little apparent evidence to back them up.

- (a) Findings of a tendency toward substantial reduction in number of competitors in a market.
- (b) Findings of a tendency to hamper or suppress increases in competition.
- (c) Findings of a lack of competitive behavior on the part of traders.
- (d) Findings that the price discrimination affected relative success in the competitive struggle, but no further findings of effect.

(a) Findings as to Tendency Toward Substantial Reduction in Number of Competitors in a Market

A common basis for concluding that competition had been injured was the finding that the price difference tended to eliminate the "injured" competitors from a market, because of lower unit profits if they met the competitive selling price, or from lower volume if they did not meet the competitive selling price but maintained unit profit. This type of finding is more than a simple determination of diversion of trade from a competitor. It is not, however, necessarily a finding of a tendency for firms to go out of business or to withdraw completely from all markets served. Rather, the finding is one of a tendency for competitors to be eliminated from one or more geographical or product markets as a result of the difference in price.

For example, a Chicago basing-point method of pricing was used in the sale of glucose, or corn syrup, to candy manufacturers. All glucose producers were not at Chicago, and there were price differences among their customers which did not vary with differences in the cost of supplying those customers. Glucose comprised up to ninety per cent of the weight of certain candies. In four cases⁸⁵ the Commission made the following finding of injury at the secondary level: the loss of profits either by absorption of the higher syrup costs or from loss of sales resulting from increased prices to recover such higher syrup costs would generally diminish the ability of those candy manufacturers paying the higher prices for such syrup to compete in the sale of their products with candy manufacturers paying the lower prices for such syrup.⁸⁶

In *General Motors Corp.*,⁸⁷ it was found that the discrimination in price, in favor of customers classified as warehouse distributors and

⁸⁵ A. E. Staley Mfg. Co., 34 F.T.C. 1362, 1372 (1942), *order vacated*, 144 F.2d 221 (7th Cir. 1944), *rev'd*, 324 U.S. 746 (1945); Clinton Co., 34 F.T.C. 879, 887 (1942); American Maize-Props. Co., 32 F.T.C. 901, 906-07 (1941); Penick & Ford, Ltd., 31 F.T.C. 1494, 1499 (1940).

⁸⁶ Penick & Ford, Ltd., *supra* note 85, at 1499.

⁸⁷ 50 F.T.C. 54 (1953) (the *AC Spark Plug* case).

national distributors and against jobbers who were "in direct competition" with them, resulted in "a lessening of [the jobbers'] ability to compete with Warehouse Distributors and national distributors in the resale of . . . AC products."⁸⁸

Findings of this type were made at the primary level in two "contested" decisions,⁸⁹ and at the secondary level in seven such decisions.⁹⁰ In one case the competitor being eliminated was the sole competitor of the price discriminator.⁹¹

A number of additional cases contained findings which superficially indicated a tendency toward reduction of number of competitors in a market, but in fact stated this as a possibility and not as an actual tendency affirmatively found. For example, in *E. Edelmann & Co.*,⁹² there was a statement that "if 2% discount means the difference between profit and no profit, or accounts for half of the jobber profit, the three discounts remaining under attack in this case, ranging from 5% to 20%, spell the difference between commercial life or death."⁹³ In the same case, the Commission stated that "respondent's discounts ranging from 5% to 20% contribute directly and powerfully to recipient jobbers' ability to compete in the resale of respondent's merchandise."⁹⁴ On first inspection one might be tempted to classify these findings under those of "a tendency to reduction of number of competitors in a market." Such a tendency, however, would depend on the degree of generality and cumulation of such price differences.⁹⁵ In point of fact, closer inspection of the findings reveals that no such tendency is actually stated. On the contrary, the opinion goes on to

⁸⁸ *Id.* at 67. Similarly, in Standard Brands, Inc., 46 F.T.C. 1485 (1950), modified and aff'd, 189 F.2d 510 (2d Cir. 1951), where the company had violated an earlier order to cease and desist from offering discriminatory volume discounts and from off-scale pricing, 29 F.T.C. 121 (1939), the finding was made that Standard Brands' adoption of another discriminatory price scale had the following results: "Practically all competitors were compelled to curtail their operations by reducing the number of their delivery routes, by reducing the number of customers served or otherwise," 46 F.T.C. at 1493, and Standard Brands' discrimination forced its competitors to "lower their prices to an extent which threatened their ability to survive," *id.* at 1495. And in Standard Oil Co., 41 F.T.C. 263 (1945), modified and enforced, 173 F.2d 210 (1949), rev'd, 340 U.S. 231 (1951), the finding was that the giving of jobber prices to retailers who had bulk storage facilities gave "a substantial competitive advantage" to the favored retailers, which advantage "has been used to divert large amounts of business from other retailers of gasoline, including customers of the respondent, with resultant injury to them and to their ability to continue in business . . ." *Id.* at 276.

⁸⁹ *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 520 (6th Cir. 1944); *Standard Brands, Inc.*, 46 F.T.C. 1485, 1495 (1950).

⁹⁰ *General Motors Corp.*, 50 F.T.C. 54, 67 (1953); *Standard Oil Co.*, 41 F.T.C. 263, 276 (1945), modified and enforced, 173 F.2d 210, 213 (7th Cir. 1949), rev'd, 340 U.S. 231 (1951); cases cited note 85 *supra*.

⁹¹ *E. B. Muller & Co. v. FTC*, 142 F.2d 511, 520 (6th Cir. 1944).

⁹² 51 F.T.C. 978 (1955), aff'd, 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958).

⁹³ 51 F.T.C. at 986.

⁹⁴ 51 F.T.C. at 1002.

⁹⁵ See text following note 35 *supra*.

state: "There is less likelihood of the 'commercial corpse' of bygone days in an era and in a market of virtual price uniformity at the retail level."⁹⁶ Such findings cannot be taken as those of a tendency to reduction in number of competitors.⁹⁷

In several cases, findings of "no injury" were based on the absence of the finding under discussion. In an early case at the primary level, the file was closed because the "evidence negatived the idea that the 10¢ price was fixed by the mail order firm with the purpose and intent of eliminating competition,"⁹⁸ thus using the Sherman Act test of "intent" in determination of whether there was a tendency toward reduction in number of competitors.

The fact that the market-share of competitors of the discriminator had increased would generally indicate the absence of a tendency for the discrimination to cause a reduction in number of competitors at the primary level. The absence of such a tendency was proposed by Commissioner Mason as the basis for a finding of "no injury" in his dissent in *Minneapolis-Honeywell Regulator Co.*:⁹⁹ "Taking into consideration that respondent's competitors had gained instead of lost business during the period under scrutiny, whilst the respondent receded from its dominant position in the market, would indicate that competition had been very much improved in the heat control industry."¹⁰⁰ Mason's reasoning was accepted by the court of appeals, which stated that "competitor competition was not injured, a finding concurred in by the dissenting member of the Commission," and that the market-share data along with other facts, "outweigh the facts relied upon by the Commission in reaching the opposite conclusion."¹⁰¹ Certiorari was dismissed by the Supreme Court on the grounds that the petition for the writ had not been timely filed.¹⁰²

⁹⁶ 51 F.T.C. at 1003.

⁹⁷ In these cases, involving the resale of automobile parts, the price-disfavored jobbers who were called as witnesses testified that they were not injured. In *Moog Indus., Inc.*, 51 F.T.C. 931, 953 (1955), *aff'd*, 238 F.2d 43 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958), it was conceded that every disfavored customer would, if called, deny that he had been injured. The hearing examiner, however, stated that "these witnesses admitted that their reasons for stating that they had not been competitively injured was due to the fact that their competitors all followed the suggested resale price of the respondent and that there was no price competition in their particular trade areas." 51 F.T.C. at 939. It is also possible that the "disfavored" witnesses enjoyed "favored" positions in purchase of other items and did not wish to do anything that might lead to an upsetting of these relationships. Other sections of the automobile parts decision contain findings of a "competitive advantage" to the favored customers—our category *d*. See notes 130-66 *infra* and accompanying text.

⁹⁸ FTC, A BRIEF SUMMARY OF 64 ROBINSON-PATMAN CASES 11.

⁹⁹ 44 F.T.C. 351, 400 (1948).

¹⁰⁰ *Id.* at 403.

¹⁰¹ 191 F.2d 786, 790 (7th Cir. 1951).

¹⁰² 344 U.S. 206 (1952). The dismissal of the writ by the Court has led some to rely—perhaps mistakenly—on the grounds expressed by the Seventh Circuit for its decision. See, e.g., ATT'Y GEN. NAT. COMM. ANTITRUST REP. 162-64 (1955). But the majority of the Commission had not confined itself to consideration only of the

A simpler, but less logical, test than the market-share test was proposed in the court of appeals decision of the *Morton Salt* case: "Contrary to the inferences drawn by the respondent Commission . . . the evidence shows substantial increases in sales to all non-discount customers in all trade areas for the entire period covered by the Commission's evidence. The inference, if any could be drawn, was that the quantity discount system of petitioner tended to increase, not injure, competition."¹⁰³ This reasoning, based on the absence of a tendency for "injured" firms to leave the market, and ignoring other possible bases for findings of injury to competition, was rejected by the Supreme Court.¹⁰⁴ It was, however, used by the Commission itself in the more recent case of *General Foods Corp.*,¹⁰⁵ where a dominant nationwide firm offered special prices only in the territory of smaller competitors who had been expanding their market areas. Here, a gain in simple unit sales of the competitors of the respondent was taken by the Commission as the basis for a finding of "no injury"—this in a period of substantial increase in the size of the total market.

(b) *Findings as to Tendency To Hamper or Suppress Increases in Competition*

(1) In four decisions at the primary level¹⁰⁶ and three decisions at the secondary level,¹⁰⁷ there was a finding of foreclosure of a substantial part of a market, generally by a large or diversified seller. To illustrate, in *American Optical Co.*¹⁰⁸ and *Bausch & Lomb Optical Co.*,¹⁰⁹ where a volume discount was employed by these large and relatively diversified firms, the following findings were made by the Commission:

The smaller limited line manufacturer is not in a position to offer a similar . . . plan. . . . The tendency of the cumulative

absence of a tendency toward competitors' leaving the market. The majority opinion stated: "To the extent that business is held by or diverted to respondent from its competitors by its discriminatory prices and unfair practices, competition has been adversely affected within the meaning of the law." 44 F.T.C. at 397. This suggested application of category *b3*, see notes 115-17 *infra* and accompanying text, in addition to the application of category *a*, would clearly make a showing of decline in the market share of the price discriminator an insufficient basis, standing alone, for a finding of "no injury."

¹⁰³ *Morton Salt Co. v. FTC*, 162 F.2d 949, 957 (7th Cir. 1947).

¹⁰⁴ 334 U.S. 37 (1948).

¹⁰⁵ *General Foods Corp.*, 50 F.T.C. 885, 891 (1954).

¹⁰⁶ *Maryland Baking Co.*, 52 F.T.C. 1679, 1689 (1956), *aff'd*, 243 F.2d 716, 718 (4th Cir. 1957); *Bausch & Lomb Optical Co.*, 28 F.T.C. 186, 198 (1939); *American Optical Co.*, 28 F.T.C. 169, 181-82 (1939).

¹⁰⁷ *Electric Auto-Lite Co.*, 50 F.T.C. 73, 81 (1953); *Champion Spark Plug Co.*, 50 F.T.C. 30, 46 (1953); *Curtiss Candy Co.*, 44 F.T.C. 237, 264 (1947).

¹⁰⁸ 28 F.T.C. 169 (1939).

¹⁰⁹ 28 F.T.C. 186 (1939).

. . . discounts is to induce the retailer whose purchases are little more than enough to qualify therefor to group all his purchases with the respondents' wholesale branch . . . and to that extent prevents freedom of competition for such . . . business on the basis of price, quality, and efficiency of service.¹¹⁰

In *Electric Auto-Lite Co.*,¹¹¹ where spark plugs were purchased by automobile makers to be sold by them to their dealers for resale as replacement parts, the finding on the secondary level was that "the lower purchasing price on replacement spark plugs enjoyed by vehicle and engine manufacturers enabled them to effectively promote the sale of such spark plugs to their own distribution outlets and thus deprived respondent's Warehouse Distributors and Direct Jobbers of the opportunity of selling to such accounts."¹¹²

(2) In six decisions¹¹³ the supporting finding was that the discriminatory price policy served as a barrier to the entry of potential competitors. All these findings were at the secondary level, and all involved geographical discrimination in the price of glucose, a product priced to candy manufacturers on the basis of a Chicago basing-point system. It was a major ingredient in low-priced candies which were sold in a highly competitive, price-conscious market. To quote the findings: "The lower profits . . . to candy manufacturers paying higher prices for glucose . . . deters [sic] some who otherwise would enter the manufacture of candy in those cities where respondents' glucose prices are higher."¹¹⁴

(3) In two commission decisions,¹¹⁵ both at the primary level, the discriminatory pricing was held to injure competition because it hampered the expansion of competitors of the large, dominant firms which were practicing the discrimination.

¹¹⁰ 28 F.T.C. at 181-82. A similar findit was made in *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957), where a much larger, more widespread, and relatively diversified maker of ice cream cones made a price cut of twenty-five per cent on a particular type of cone made by a small, localized competitor, the cut being limited to the area where the smaller firm operated. The smaller firm was the sole competitor in this area. The court stated: "There is evidence that the price cut . . . deprived the competitor of its normal channel of distribution through jobbers with the loss to the competitor of about half its volume of business in the product in question." *Id.* at 718.

¹¹¹ 50 F.T.C. 73 (1953).

¹¹² *Id.* at 81.

¹¹³ *A. E. Staley Mfg. Co.*, 34 F.T.C. 1362, 1372 (1942), *order vacated*, 144 F.2d 221, 223-24 n.2 (7th Cir. 1944), *rev'd*, 324 U.S. 746 (1945); *Clinton Co.*, 34 F.T.C. 879, 887 (1942); *Hubinger Co.*, 32 F.T.C. 1116, 1127 (1941); *Union Starch & Ref. Co.*, 32 F.T.C. 60, 67 (1940); *Anheuser-Busch, Inc.*, 31 F.T.C. 986, 993 (1940).

¹¹⁴ *Clinton Co.*, 34 F.T.C. 879, 887 (1942).

¹¹⁵ *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 397-98 (1948), *rev'd*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952); *E. B. Muller & Co.*, 33 F.T.C. 24, 51 (1941), *aff'd*, 142 F.2d 511 (6th Cir. 1944).

In *E. B. Muller & Co.*,¹¹⁶ there was only one competitor of the dominant firm, which operated through two noncompeting units. In this situation, "injury to the competitor" was the equivalent of "injury to competition." The competitor operated in only part of the dominant firm's geographical market. The Commission in its findings stated:

The effect of respondents' selling below cost in the trade area in which their competitor . . . operates, and the discriminations in price caused by selling to customers in the trade territory covered by [the competitor] at lower prices than elsewhere in the United States, has been to divert to themselves a substantial volume of business which their competitor might otherwise have obtained, to force their competitor to sell at unprofitable prices or at prices which represent a loss in order to avoid being forced out of business, and thus to impair their competitor's financial position and render it unreasonably difficult if not impossible for it to secure capital to finance and expand its operations.¹¹⁷

(c) *Findings as to Lack of Competitive Behavior on the Part of Traders*

(1) In three decisions¹¹⁸ there were findings of injury to competition, all at the secondary level, because of a reduction in competitive effort on the part of the disfavored customers due to the reduced profit in that line.

In *C. F. Sauer Co.*,¹¹⁹ where food products were sold to competing purchasers at price differentials of from five to twenty-five per cent, the Commission stated:

The differentials . . . [were] sufficient to permit the purchasers charged the lower prices to resell, and such purchasers did so resell, such food products at prices only slightly higher than, as low

¹¹⁶ 33 F.T.C. 24 (1941).

¹¹⁷ *Id.* at 51. On petition for review, the Sixth Circuit made a finding of the type discussed in category *a*, see notes 85-105 *supra* and accompanying text. In *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), a volume discount structure was used by the dominant maker of automatic temperature controls, but the market share of this dominant firm had declined from approximately seventy-three per cent to sixty per cent in four years. The company argued that its decline in market share should be the basis for a finding of "no injury," and this viewpoint was adopted in the dissent of Commissioner Mason and in the decision of the court of appeals. See notes 99-102 *supra* and accompanying text. The majority of the Commission, however, stated: "the law does not permit respondent to resort to unfair or discriminatory practices in order to maintain its competitive position in the industry. If its use of such practices substantially interferes with or impedes the progress or growth of competitors, there has been a substantial injury to or lessening of competition within the meaning of the law." 44 F.T.C. at 397.

¹¹⁸ *A. E. Staley Mfg. Co.*, 34 F.T.C. 1362, 1372 (1942), *order vacated*, 144 F.2d 221 (7th Cir. 1944), *rev'd*, 324 U.S. 746 (1945); *Clinton Co.*, 34 F.T.C. 879, 888 (1942); *C. F. Sauer Co.*, 33 F.T.C. 812, 826 (1941).

¹¹⁹ 33 F.T.C. 812 (1941).

as, or lower than the prices at which competing resellers were able to purchase such food products from respondent. Purchasers paying the higher prices . . . were unable to resell them except at a loss, at no profit, or at a profit insufficient, those commodities alone considered, to warrant continued or anything but passive resale effort.¹²⁰

In *Clinton Co.*¹²¹ and *A. E. Staley Mfg. Co.*,¹²² glucose made up approximately eighty-five per cent of the mixed table syrup which was compounded by a number of buyers of glucose. As previously pointed out, glucose was sold under a Chicago basing-point price system. The findings in *Clinton Co.* stated that "under such circumstances the sales and profits of table syrup mixers paying the higher prices for glucose have been less than they would have been, or would be, if the price of such glucose were lower; and such lessening or lowering of sales and profits has diminished their incentive to compete with table syrup mixers paying lower prices for glucose"¹²³

(2) In four commission and court decisions,¹²⁴ all involving a geographical pattern of discrimination, the finding was made at the primary level of a failure of the firms using the discriminatory price system to compete actively in price on an individual basis.

In the *Cement Institute* case,¹²⁵ the Commission found that the evidence supported the allegation that:

[U]nder . . . [the multiple basing-point delivered-price] system each respondent knows that in reciprocity for its omission to offer a competitive price to customers located in areas adjacent to its mill, where it has a natural advantage and receives its highest actual price, other respondents will reciprocally waive their advantages and thus the advantages and disadvantages of each will be neutralized "in order that there may not anywhere be genuine competition in price."¹²⁶

Similarly, in *National Lead Co.*,¹²⁷ the majority described the zone-delivered price system as a "conspiratorial pricing pattern"¹²⁸

¹²⁰ *Id.* at 826.

¹²¹ 34 F.T.C. 879 (1942).

¹²² 34 F.T.C. 1362 (1942).

¹²³ 34 F.T.C. at 888.

¹²⁴ *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 749 (1945); *National Lead Co.*, 49 F.T.C. 791, 887 (1953), *aff'd as modified*, 227 F.2d 825 (7th Cir. 1955), *rev'd*, 352 U.S. 419 (1957); *The Cement Institute*, 37 F.T.C. 87, 254 (1943), *order vacated*, 157 F.2d 533 (7th Cir. 1946), *rev'd*, 333 U.S. 683, 721-26 (1948).

¹²⁵ 37 F.T.C. 87 (1943).

¹²⁶ *Id.* at 254.

¹²⁷ 49 F.T.C. 791 (1953).

¹²⁸ *Id.* at 887.

and also found that "the pricing pattern . . . was not the result of one secret meeting in a smoke-filled room. It is the result of many business experiences and compromises over a period of years."¹²⁹

(d) Findings as to Price Discrimination Affecting Relative Success in the Competitive Struggle But No Further Findings of Effect

In some cases, the Commission, after stating that a diversion of trade has taken place, or that a competitive advantage has been given, has gone on to point out further effects of the kinds discussed in the preceding categories. These cases are classified in the appropriate category on the basis of the second and more specific finding. Other cases, however, contain findings which state only that a diversion of trade has taken place, or that a competitive advantage was given, and make no finding of any further effect. It is these cases which are included in category *d*.

The Commission has used such findings of "competitive advantage" as bases for findings of injury without regard to possible offsetting disadvantages. In answering a defense, made in a case involving resale of automotive replacement parts, that the discriminatory price advantage was offset by disadvantages of other types, the Commission unanimously affirmed an initial decision which contained the following statement:

It seems to this Hearing Examiner, however, that Section 2(a) of the Clayton Act is concerned primarily, if not exclusively, with commanding equality of price among competitors at the time of purchase, rather than with the myriad factors of a reselling operation which may destroy the effect of that equality, or if there be no price equality, may offset disadvantage on the one hand or advantage on the other. Enforcement of the law would become well-nigh futile if the number of salesmen, their respective salaries, commissions, and efficiency, location of their business, rents paid, truck maintenance and the wisdom of employing this or that resale aid or the efficiency of any of them have to be gone into. If a price preference can be justified to one customer because the recipient's location is poorer or his rent higher or his maintenance more expensive than those of a customer not receiving such price preference, it would inevitably lead to an evaluation of the efficiencies of hundreds of purchasers and to a probable subsidization by the seller of inefficiency itself. Pricing by resale efficiency must inevitably lead to pricing by customer—the very practice at which the law was aimed to prevent. The Hearing Examiner does not believe such was the Congressional intention. He is of the opinion that the mandate requires only equal price opportu-

¹²⁹ *Id.* at 885.

nity, that what the purchaser does thereafter in the resale of his own merchandise, if he then operates inefficiently or fritters away his equal price start, is, presently at least, no concern of the law.¹³⁰

(1) In fourteen commission and court decisions,¹³¹ the finding was made at the secondary levels that the discriminatory lower price allowed the beneficiary to sell at lower prices, or to divert business through the passing on of the difference. Such a finding is one of an advantage affecting relative success in the competitive struggle, but no more.¹³² In other cases, findings of "no injury" were based on the absence of a sufficient basis for the finding under discussion: among the circumstances relied upon by the court of appeals for its secondary level finding of "no injury" in *Minneapolis-Honeywell* was the "absence of causal connection between the price of controls and the price of the finished products"¹³³ Certiorari was dismissed by the Supreme Court on the ground of untimeliness,¹³⁴ and thus the reasoning of the Seventh Circuit was not reviewed.¹³⁵ However, the ra-

¹³⁰ C. E. Niehoff & Co., 51 F.T.C. 1114, 1121-22 (1955).

¹³¹ Fruitvale Canning Co., 52 F.T.C. 1504, 1513 (1956); Doubleday & Co., 52 F.T.C. 169, 198 (1955); C. E. Niehoff & Co., 51 F.T.C. 1114, 1122-23 (1955), modified and aff'd, 241 F.2d 37 (7th Cir. 1957), modification rev'd, 355 U.S. 411, cert. denied, 355 U.S. 491 (1955); National Lead Co., 49 F.T.C. 791, 883 (1953); International Salt Co., 49 F.T.C. 138, 150 (1952); The Ruberoid Co., 46 F.T.C. 379, 386 (1950), order aff'd, enforcement denied, 191 F.2d 294 (2d Cir. 1951), aff'd, 343 U.S. 470 (1952); Curtiss Candy Co., 44 F.T.C. 237, 264 (1947); Morton Salt Co., 39 F.T.C. 35, 43 (1944), order vacated, 162 F.2d 949 (7th Cir. 1947), rev'd and remanded, 334 U.S. 37, 46-47 (1948); Atlantic City Wholesale Drug Co., 38 F.T.C. 631, 635-36 (1944); Corn Prods. Ref. Co., 34 F.T.C. 850, 865 (1942), order modified, 144 F.2d 211, 215 (7th Cir. 1944), aff'd, 324 U.S. 726, 738-39 (1945); E. B. Muller & Co., 33 F.T.C. 24, 53 (1941), aff'd, 142 F.2d 511 (6th Cir. 1944).

¹³² For the typical phraseology of these findings, see *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 739 (1945) ("enough to divert business from one manufacturer to another"); *The Ruberoid Co.*, 46 F.T.C. 379, 386 (1950) ("could be decisive in securing the business for the applicator offering the lower price"); *Morton Salt Co.*, 39 F.T.C. 35, 43 (1944) ("difference of 5 cents per case may result in the loss of a sale to a customer, not only of the salt involved but of other commodities as well, the order for which might be placed with the salt purchase"); *Atlantic City Wholesale Drug Co.*, 38 F.T.C. 631, 635-36 (1944) ("as a result thereof it was possible for the respondents to, and they did, resell . . . at prices substantially less").

¹³³ *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 790 (7th Cir. 1951), cert. dismissed, 344 U.S. 206 (1952).

¹³⁴ 344 U.S. 206 (1952). See note 102 *supra*.

¹³⁵ The Seventh Circuit's reasoning had been explicitly rejected by the Commission. In response to a defense that the price discrimination in a principal component would not necessarily cause a variation in the price of the assembled product, the Commission stated: "The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility—a share which appears to have been real and substantial." *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 398 (1948). In the later "spark plug" cases, however, where a very minor component was involved, the lack of a necessary causal connection between the cost differential for spark plugs and competitive injury sustained by the disfavored automobile makers was the basis for a finding of "no injury" among the automobile makers. See *Electric Auto-Lite Co.*, 50 F.T.C. 73, 77 (1953); *General Motors Corp.*, 50 F.T.C. 54, 60 (1953).

tionale of *Minneapolis-Honeywell* as to component parts has not found favor with the Commission where replacement parts, intended for resale as such, are involved:

Here we have a product bought for resale as is; there the product purchased became a part of an assembled final product, and the Court found no causal relationship between the cost of the one and the price of the other, saying,

"It may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified."¹³⁶

(2) In nine decisions¹³⁷ there were secondary level findings that the discriminatory price difference allowed the beneficiary to engage in, or to divert business by means of, a greater nonprice promotional effort. Thus, in *Standard Motor Prods., Inc.*,¹³⁸ it was found that:

Respondent issued suggested resale price lists, which were generally followed by its customers. This, however, does not settle the question of probability of injury. A more advantageous price to one customer gives him increased margin of profit, permits additional services to customers, more vigorous selling and other opportunities for the extension of his business at the expense of his less-favored competitors.¹³⁹

¹³⁶ E. Edelmann & Co., 51 F.T.C. 978, 993 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956).

¹³⁷ Standard Motor Prods., Inc., 54 F.T.C. 814, 828 (1957); P. & D. Mfg. Co., 52 F.T.C. 1155, 1161 (1956), *aff'd*, 245 F.2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); E. Edelmann & Co., 51 F.T.C. 978, 990-91 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956); Whitaker Cable Corp., 51 F.T.C. 958, 967 (1955), *aff'd*, 239 F.2d 253 (7th Cir. 1956); Moog Indus., Inc., 51 F.T.C. 931, 939 (1955), *aff'd*, 238 F.2d 43, 51 (8th Cir. 1956), *aff'd per curiam*, 355 U.S. 411 (1958); Champion Spark Plug Co., 50 F.T.C. 30, 40 (1953); Namsco, Inc., 49 F.T.C. 1161, 1169 (1953); Curtiss Candy Co., 44 F.T.C. 237, 269 (1947).

¹³⁸ 54 F.T.C. 814 (1957).

¹³⁹ *Id.* at 828. Similarly, in *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953), it was found that the discrimination in favor of the Ford Motor Company "caused Ford to engage in the various advertising and promotional campaigns" and that "as a result of such . . . activities . . . Ford dealers prefer to purchase their requirements . . . from Ford Motor Company." *Id.* at 40. And in *Curtiss Candy Co.*, 44 F.T.C. 237 (1947), the finding was made that the lower prices to Automatic Canteen and other favored customers "enabled them to earn more profits, provide more facilities and better services, give more aid to their distributors, and pay a higher rate of commission for preferred locations." *Id.* at 269. Note also the finding, in substantially identical language, which was made in a proceeding against the recipient of the lower prices, *Automatic Canteen Co. of America*, 46 F.T.C. 861, 885 (1950), *aff'd*, 194 F.2d 433 (7th Cir. 1952).

Some of the decisions classified under this category also include a finding that the price difference "contributes to the aggregate which determines whether a jobber grows, remains the same size, goes backward or fails."¹⁴⁰ While this finding seems to suggest categories *a* and *b3*, it actually does not state that the Commission found either a tendency toward fewer competitors or a hampering of the growth of competitors. The finding, which is made in a number of cases involving resale of automobile replacement parts, is actually one of a diversion of trade through nonprice competition. Here, as in the *Standard Motor* case, the favored firms did not cut resale prices as a result of the savings which accrued to them as beneficiaries of the price difference. The Commission, however, made the finding that the savings were used to finance "additional service to customers, additional salesmen to call on them, carrying a larger and more varied stock, branch houses, proximity to customers The institution or expansion of these competitive aids depends directly on operating profit margin, a major factor in which, on this record, is cost of merchandise purchased."¹⁴¹ The overall finding being made in these cases is, therefore, that the discrimination affects the relative amount of nonprice selling effort on the part of firms at the secondary level, thus affecting the amount of business going to the beneficiaries on the one hand, and to the nonbeneficiaries on the other. This diversion of trade will influence relative success in the competitive struggle, but the finding goes no further than to state that the discrimination makes possible a diversion of trade through nonprice promotional effort.

(3) In nine commission decisions,¹⁴² again at the secondary level, the finding was that the price difference enabled the beneficiary *either* to undersell or to increase the nonprice sales effort. Thus it is a combination of findings *d1* and *d2*, generally stated as alternative possibilities. For example, in the first *Standard Brands* decision,¹⁴³ the finding was that the price advantage to large and multiplant bakers "can be used for periodical reductions in price or increase in service, sales

¹⁴⁰ Namsco, Inc., 49 F.T.C. 1161, 1169 (1953).

¹⁴¹ *Ibid.*

¹⁴² P. Sorenson Mfg. Co., 52 F.T.C. 1659, 1665-66 (1956), *aff'd per curiam*, 246 F.2d 687 (D.C. Cir. 1957); General Foods Corp., 52 F.T.C. 798, 811-12 (1956); F. & V. Mfg. Co., 46 F.T.C. 632, 638 (1950); Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 398 (1948), *rev'd in part*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952); Curtiss Candy Co., 44 F.T.C. 237, 269 (1947); E. J. Brach & Sons, 39 F.T.C. 535, 547 (1944); Dentists' Supply Co., 37 F.T.C. 345, 358 (1943); A. S. Aloe Co., 34 F.T.C. 363, 371-72 (1941); Standard Brands, Inc., 29 F.T.C. 121, 138-39 (1939), *modified and aff'd*, 189 F.2d 510 (2d Cir. 1951).

¹⁴³ *Standard Brands*, Inc., 29 F.T.C. 121 (1939).

effort, and sales appeal.”¹⁴⁴ Similar volume discounts given in *Dentists' Supply Co.*¹⁴⁵ were found to enable the beneficiaries “to undersell their competitors or furnish better facilities and services”¹⁴⁶ And in the *Minneapolis-Honeywell* case,¹⁴⁷ the finding at the secondary level was that the discriminatory price advantage “may be reflected . . . either in lower prices, more extensive advertising, better service to customers, more effective selling methods, or improved quality, or in a combination of these potent competitive factors.”¹⁴⁸

(4) In four commission decisions and two court decisions,¹⁴⁹ all at the secondary level, findings consisted only of a general statement that the discriminatory price gave “a significant competitive advantage” to the favored customers, with no further finding of specific effects. To illustrate from the findings in the *American Optical Co.* decision,¹⁵⁰ “the lower price . . . has been and is a distinct competitive advantage”¹⁵¹ Similarly, one of the secondary level findings in the *General Motors* decision¹⁵² was that the off-scale “discriminations in price as between its national distributor accounts have given the accounts receiving the lower prices a substantial competitive advantage over the accounts paying the higher prices.”¹⁵³

In some instances the Commission has found “no injury” at the secondary levels where the price difference was not among firms in competition with each other. This lack of a “competitive” aspect has been found in cases where, first, prices did not differ significantly within competitive areas,¹⁵⁴ and, second, there was no substantial

¹⁴⁴ *Id.* at 138-39.

¹⁴⁵ 37 F.T.C. 345 (1943).

¹⁴⁶ *Id.* at 358.

¹⁴⁷ *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).

¹⁴⁸ *Id.* at 398.

¹⁴⁹ *Whitaker Cable Corp. v. FTC*, 239 F.2d 253, 255 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957); *E. Edelmann & Co. v. FTC*, 239 F.2d 152, 155 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); *General Motors Corp.*, 50 F.T.C. 54, 67 (1953); *Curtiss Candy Co.*, 44 F.T.C. 237, 269, 273 (1947); *Bausch & Lomb Optical Co.*, 28 F.T.C. 186, 198 (1939); *American Optical Co.*, 28 F.T.C. 169, 180 (1939).

¹⁵⁰ 28 F.T.C. 169 (1939).

¹⁵¹ *Id.* at 180.

¹⁵² 50 F.T.C. 54 (1953).

¹⁵³ *Id.* at 67.

¹⁵⁴ FTC, A BRIEF SUMMARY OF 64 ROBINSON-PATMAN CASES 15, 39, 43. See Statement of Federal Trade Comm'n Policy, Oct. 12, 1948: “In the Morton Salt case, the court, in commenting upon the Commission's proof of injury, suggested that injury might be inferred from substantial price differences without further evidence of the effect on competition such as might be shown through examination of volume or profit margins However, there are strong reasons why the concept of injury adopted by the court in the Morton Salt case should not be applied automatically to discriminations arising under geographic pricing systems in which purchasers paying

competition between the favored and unfavored buyer groups.¹⁵⁵ There have also been conclusions of "no injury" at the secondary levels which were based on findings that the price advantages were available to all customers and used by all customers whose trade in the product was significant.¹⁵⁶ And finally, the Commission has found "no injury" based on findings that the price advantage itself was insignificant¹⁵⁷ or had only negligible effects upon competitors.¹⁵⁸

(5) All the preceding categories under *d* included secondary level findings only. But in seven commission decisions¹⁵⁹ the finding at the *primary* level was simply that the price difference was sufficient to divert, or did divert, business from the competitors of the discriminator. There was no further finding of primary level effect as the basis for the finding of injury. For example, in *E. J. Brach & Sons*,¹⁶⁰ it was found that off-scale pricing was "of considerable im-

different prices are differently located and the price differences gradually diminish as the distances diminish between purchasers' locations. In these circumstances competition between purchasers paying significantly different prices may occur in quite limited areas or only along the fringes of trade territories."

¹⁵⁵ Examples of such noncompetitive groups might be soft drink bottlers and soda fountains, see FTC, *op. cit. supra* note 154, at 32, or original equipment buyers and replacement parts buyers, see General Motors Corp., 50 F.T.C. 54, 61 (1953).

¹⁵⁶ See Standard Brands, Inc., 29 F.T.C. 121, 140 (1939), *modified and aff'd*, 189 F.2d 510 (2d Cir. 1951); American Optical Co., 28 F.T.C. 169, 183 (1939); FTC, *op. cit. supra* note 154, at 30. And in FTC v. Morton Salt Co., 334 U.S. 37 (1948), where injury was found, there was considerable question as to the basis of the company's defense that its car-lot discount was available to ninety-nine per cent of its customers. See *id.* at 60-61 (dissent). The "sample" area was Chicago, and "car-lot" purchases included those picked up by small Chicago customers at the company's warehouse. *Id.* at 48 n.17.

¹⁵⁷ FTC, *op. cit. supra* note 154, at 4, 15.

¹⁵⁸ B. F. Goodrich Co., 50 F.T.C. 622, 623 (1954); E. I. du Pont de Nemours & Co., 46 F.T.C. 1069, 1073 (1949). In Kraft-Phenix Cheese Corp., 25 F.T.C. 537, 543-46 (1937), a finding of "no possible injury" at the secondary level was made on the basis of the following findings: (1) retail prices varied by as much as two or three cents a package, while the differences in costs to retailers were three-quarters of a cent a package or less; (2) many other factors affected retail price; (3) there was no appreciable diversion of trade even with a two to three cent difference in retail price; (4) profit margins of all retailers were "adequate"; and (5) there was no selling at a loss and only negligible loss of profit by the disfavored retailers. In this early case, the Commission found no injury in such "remote and minute" effects. The decision, however, must be viewed as an exception to the Commission's attitude toward injury. The points made were overruled a short time thereafter. See, e.g., H. C. Brill Co., 26 F.T.C. 666, 680 (1938).

¹⁵⁹ Anheuser-Busch, Inc., 54 F.T.C. 277, 300 (1957); Page Dairy Co., 50 F.T.C. 395, 398 (1953); Automatic Canteen Co. of America, 46 F.T.C. 861, 895 (1950), *aff'd*, 194 F.2d 433 (7th Cir. 1952); Krengel Mfg. Co., 46 F.T.C. 75, 80 (1949); Curtiss Candy Co., 44 F.T.C. 237, 268 (1947); E. J. Brach & Sons, 39 F.T.C. 535, 543 (1944); Samuel H. Moss, Inc., 36 F.T.C. 640, 648 (1943), *aff'd*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

¹⁶⁰ 39 F.T.C. 535 (1944).

portance in attracting the patronage of such large buyers for resale.”¹⁶¹ The finding in *Krengel Mfg. Co.*¹⁶² was that, as a result of unsystematic pricing by Krengel, an “account was practically lost to respondents by one of their competitors because of such competitor’s inability to meet respondents’ low, discriminatory prices.”¹⁶³ Similarly, in *Anheuser-Busch, Inc.*,¹⁶⁴ it was found that price cutting confined to a local area in a national firm’s market “manifestly resulted in a substantial diversion of sales from competitors”¹⁶⁵

While the absence of further findings would indicate a serious deficiency under an economic approach to the determination of “injury” in the broad sense, it must be remembered that the Robinson-Patman Act also contains a standard of “injury” to individual competitors or groups of competitors.¹⁶⁶ And since further findings are unnecessary under the legal approach, their absence does not mean that such findings would not have been warranted.

(e) *No Basis Except the Finding of a Non-Cost-Justified Price Difference Among Customers*

In five cases,¹⁶⁷ one of the bases discussed above was given in support of a finding of injury at the secondary level, but no such basis was given to support findings of injury which were made at the primary level. It is possible that in these cases the primary level findings were made incidentally, as a result of the parroting of the statutory language which is characteristic of findings of injury. Another explanation might be that, since the secondary level finding was supported—and by itself would have been sufficient for a finding of injury—the Commission saw no need to support the further findings of injury at the primary level.

¹⁶¹ *Id.* at 543.

¹⁶² 46 F.T.C. 75 (1949).

¹⁶³ *Id.* at 80.

¹⁶⁴ 54 F.T.C. 277 (1957).

¹⁶⁵ *Id.* at 300.

¹⁶⁶ See notes 64-71 *supra* and accompanying text. See also *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 295-96 (1957): “Accelerating an existing downward sales trend, or arresting and reversing an upward sales trend of competitors, is evidence of the required statutory effect The law does not require that a competitor be put out of business completely or permanently, or irretrievably crippled, by a price discrimination before a finding of the prescribed competitive effect can be made.”

¹⁶⁷ *F. & V. Mfg. Co.*, 46 F.T.C. 632 (1950); *Dentists’ Supply Co.*, 37 F.T.C. 345 (1943); *Corn Prods. Ref. Co.*, 34 F.T.C. 850 (1942), *order modified*, 144 F.2d 211 (7th Cir. 1944), *aff’d*, 324 U.S. 726 (1945); *Hubinger Co.*, 32 F.T.C. 1116 (1941); *Standard Brands, Inc.*, 29 F.T.C. 121 (1939), *modified and aff’d*, 189 F.2d 510 (2d Cir. 1951).

This reasoning, however, would not apply to nine additional cases¹⁶⁸ in which findings of injury were made, but in which there was no supporting finding at any level except that of a non-cost-justified price difference among customers. In *National Biscuit Co.*,¹⁶⁹ the finding of injury was at the secondary level only. In the eight other cases, a finding of injury was made at both primary and secondary levels. All nine cases involved the use of volume discount arrangements or the extension of special prices to certain large customers or to customers who were on "preferred lists."

The absence of further supporting findings in these cases indicates a lack of application of an economic approach to the determination of injury to competition in the broad sense. By itself, however, this does not mean that the decisions were inappropriate to the law being enforced. The Robinson-Patman Act did not define "injury" only in the broad, economic sense, but rather extended the Clayton Act concept of injury to include injury to individual competitors or groups of competitors.¹⁷⁰ Thus the law which the Commission enforces is one which does not apply only to those cases in which broad, economic injury is found. Furthermore, since the Commission is not required to find the latter type of injury as the basis for an order, it is legally sound for it to base its order solely on a finding of the narrower type.

In enforcement of the Robinson-Patman Act, the Commission might choose to use a broad, economic approach in the selection of cases. Once a complaint was made, however, it would not be legally proper for the Commission to limit its orders to those cases in which one of the standards in the act applied, while dismissing cases in which another of the standards was equally applicable. It should also be remembered that the lack of findings of broad, economic injury does not mean that such findings could not have been made in these cases, since legally it was unnecessary for the Commission to make such further findings.¹⁷¹

¹⁶⁸ *Atlas Supply Co.*, 48 F.T.C. 53 (1951); *Central Soya Co.*, 47 F.T.C. 839 (1951); *United States Rubber Co.*, 46 F.T.C. 998 (1950); *Jacques Kreisler Mfg. Corp.*, 45 F.T.C. 136 (1948); *American Art Clay Co.*, 38 F.T.C. 463 (1944); *National Biscuit Co.*, 38 F.T.C. 213 (1944); *Sherwin-Williams Co.*, 36 F.T.C. 25 (1943); *Binney & Smith Co.*, 32 F.T.C. 315 (1940); *American Crayon Co.*, 32 F.T.C. 306 (1940).

¹⁶⁹ 38 F.T.C. 213 (1944).

¹⁷⁰ See notes 64-71 *supra* and accompanying text.

¹⁷¹ See *FTC v. Morton Salt Co.*, 334 U.S. 37, 50-51 (1948): "It would greatly handicap enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence."

Table I summarizes, for various patterns of price discrimination in the 55 contested cases where injury was found, the frequency of the conceptual bases which we have discussed. The tabulation is based on all the commission decisions in the contested cases, together with those court decisions which reiterated one or more of the Commission's supporting findings. In many of these decisions there were findings at more than one level, and in a number of decisions there was more than one finding at a given level. The total frequency of supporting findings was 80, and there were an additional 22 instances in which a finding of injury was made at the primary or secondary level, but in which no evidence of the injury was stated except the finding of a price difference among customers. However, because it was common for a given case to have a supported finding of injury at one level and an unsupported finding of injury at another level, only 9 of the contested cases had findings of injury but no findings showing the nature of supporting evidence at any level.

CONCLUSION

The courts have said that the Robinson-Patman Act is "vague and general in its wording and . . . cannot be translated with assurance into any detailed set of guiding yardsticks."¹⁷² In attempting to overcome this difficulty, can the standards or tests of injury to competition which are based on an economic approach be applied within the legal framework in which the act is administered?

Under an economics-based approach to the determination of injury *vel non* in any given case, both the type of price discrimination and the effects which are existing or probable in the market must be considered. Determination of the type of price discrimination is necessary (1) to support an inference as to whether there is a causal relationship between the price discrimination and existing effects, and (2) to aid in making an inference as to probable future effects of the price discrimination. This approach depends ultimately on analysis of the pattern of price discrimination, the purpose of the discriminator, and the setting in which the discrimination takes place.

To illustrate, a pattern of discriminatory price cutting may indicate either a promotional type of discrimination or a predatory type of discrimination. Which type it is depends on the purpose of the discriminator, and the purpose may be inferred from the pattern of discrimination and the setting—including relative power and dispersion of the firms. When the type of price discrimination is determined, inferences as to actual or probable effects require further reference to the pattern, purpose, and setting. If consideration of these factors supports an inference of a causal relationship between a type of price

¹⁷² *The Ruberoid Co. v. FTC*, 189 F.2d 893, 894-95 (2d Cir. 1951).

TABLE I

FREQUENCY OF CONCEPTUAL BASES FOR FINDINGS OF INJURY
BY PATTERNS OF DISCRIMINATION

<i>Bases for Findings</i>	<i>Patterns of Discrimination</i>						<i>Total</i>
	<i>Volume and Quantity</i>	<i>Geo-graphical</i>	<i>Functional and Selective^a</i>	<i>tematic and Off-scale</i>	<i>Inducing Discrimination</i>		
Price discrimination results in, or tends to result in:						<i>Unsys-</i>	
Substantial reduction in number of competitors in a market.	1	4	3	1	—	—	9
Foreclosure of a substantial part of a market.	2	2	3	—	—	—	7
Barrier to entry of potential competitors.	—	6	—	—	—	—	6
Hampering expansion of competitors of large, dominant firms.	1	1	—	—	—	—	2
Reduction of competitive effort by unfavored customers because of reduced profit.	—	3	—	1	—	—	4
Failure of firms using discriminatory pricing system to actively compete in prices.	1	4	—	—	—	—	5
Beneficiary enabled to sell at lower prices.	5	5	3	—	2	—	15
Beneficiary enabled to engage in greater nonprice promotional effort.	6	—	2	—	1	—	9
Beneficiary enabled either to undersell or to increase nonprice selling effort.	4	—	3	—	2	—	9
"A competitive advantage" to the favored customers.	4	—	2	—	—	—	6
Diversion of trade from competitors of discriminator.	—	2	1	2	3	—	8
No basis except that of a price difference among customers.	11	1	8	—	2	—	22

^a Price varies according to characteristics of the buyer other than volume or quantity bought or geographical location.

discrimination capable of injuring competition and one or more of the economic effects associated with such injury, a finding of injury under section 2 of the Robinson-Patman Act would be justified under the economic approach.

Through a comparison of the bases for findings of injury which would justify such findings under an economic approach, with those findings which have served as legal bases for such findings under the Robinson-Patman Act, we can determine which findings would serve as *legal* bases for findings of injury to competition in the *economic* sense. Such findings, supported by evidence, would both indicate real injury to the forces of competition in the economic sense, and also be operable in the legal framework of administration and enforcement, in that they would be findings which have been and could be made by the enforcing agency.

In making this comparison, we are concerned with injury to market competition only—the legal concept of injury to “competition with,” a concept based on “fairness,” has no separate analogous concept under an economic approach. Thus, while the agencies enforcing the Robinson-Patman Act have a standard of “injury to competitors” to enforce as well as a standard of injury to market competition, the standard based on “fairness” is irrelevant to our analysis of the extent to which legal decisions under the act are conceptually consistent with an approach based on economics. But the fact that the law contains a standard other than a purely economic one means that the analysis cannot be taken as a source of praise or blame for the agencies charged with enforcement of this law. It is simply an attempt to measure the extent to which the alleged basis for enforcement conforms to the economic standard.

Can the economic standard be applied sensibly in spite of the fact that the law contains another standard as well? In enforcing the law in those cases where injury is found, but where such a finding would not be justified under an economic approach, the Commission should certainly be aware, and make it plain, that its action is not based on economic reality and that its justification for the finding is in the legal concept of fairness. It should also be aware that the very enforcement of the standard of fairness could result in adverse effects on market competition itself. If the Commission wishes to bring enforcement into greater agreement with an economic approach, it can seek to do so by limiting the selection of cases for complaint to those which seem to be justified under the economic standard of injury to market competition.

Listed in the left column of Table II are the bases which would justify a finding of injury to competition in the economic sense, and

TABLE II

COMPARISON OF CONCEPTUAL BASES FOR FINDINGS OF INJURY

<i>Economic Bases</i>	<i>Legal Bases</i>
<i>Price discrimination results in, or tends to result in:</i>	<i>Price discrimination results in, or tends to result in:</i>
1. Elimination of a substantial alternative or group of alternatives in a market for substantially the same product or service.	a. Substantial reduction in number of competitors in a market. (Nine instances.)
2. Enablement of a trader to coerce his rivals, or making a trader so large that remaining traders lack capacity to take over a substantial part of his trade.	No instance of a comparable legal basis.
3. Substantial trader or group of traders who are less responsive to profit and loss incentives.	c1. Reduction of competitive effort by unfavored customers because of reduced profit. (Four instances.)
4. Facilitation of arrangement which substantially limits extent of competition among rivals.	c2. Failure of firms using discriminatory pricing system to actively compete in price. (Five instances.)
5. Substantially more difficulty in entry of market by new traders.	b2. Barrier to the entry of potential competitors. (Six instances.)
6. Substantial reduction in access by important traders or groups of traders on one side of the market to important traders or groups of traders on the other side.	b1. Foreclosure of a substantial part of a market, generally by a large or diversified seller. (Seven instances.)
7. Substantial implementation of a preferential status for an important trader or group of traders on the basis of law, politics, or commercial alliances.	b3. Hampering expansion of competitors of large, dominant firms. (Two instances.)
See the discussion on the following pages of the comparability with economic bases.	No instance of a comparable legal basis.
No comparable economic basis for finding of injury to competition (in the broad sense).	d1. Beneficiary enabled to sell at lower prices, or to divert trade by passing on the differences. (Fifteen instances.)
No comparable economic basis for finding of injury to competition (in the broad sense).	d2. Beneficiary enabled to engage in, or divert trade by, greater nonprice promotional effort. (Nine instances.)
	d3. Beneficiary enabled either to undersell or to increase nonprice selling effort. (Nine instances.)
	d4. "A competitive advantage" to the favored customers. (Six instances.)
	d5. Diversion of trade from competitors of the discriminator. (Eight instances.)
	e. No basis except the finding of a non-cost-justified price difference among customers. (Twenty-two instances.)

in the right column are the comparable bases which have supported findings of legal injury in cases before the Commission and the courts.¹⁷³ The table shows that, with two exceptions, all the economic bases have comparable legal bases and thus have been applied within the legal framework of the act.¹⁷⁴ It should be noted that there is no legal basis comparable to the seventh economic basis—substantial implementation of a preferential status for an important trader or group of traders “on the basis of law, politics, or commercial alliances.” However, this basis might be broadened to include any substantial preferential status within the market from whatever source derived,¹⁷⁵ for such a preferential situation distorts the allocation of resources between favored and disfavored groups, enabling some classes of firms to survive which would otherwise be eliminated because of inefficiency, and causing other classes of firms merely to hold their own when, on the basis of efficiency alone, they would increase. If the seventh economic basis for findings of injury is thus broadened to include any substantial preferential status, the legal categories *d1*, *d2*, *d3*, and *d4* would then be comparable with it.¹⁷⁶

To what extent have the findings of the FTC and the courts met the economics-based tests of “injury to competition” in the broad sense? The answer depends on whether the seventh economic basis is broadened as suggested. If the seventh economic basis is not broadened, 33 of the 102 supporting findings in the 68 contested decisions had comparable economic bases for findings of injury to competition. But since decisions are often supported by more than one finding, 27 of the 68 decisions where injury was found had findings which would conceptually support a similar finding of injury under one or more of the first six economic tests.¹⁷⁷

¹⁷³ In parentheses following each type of legal finding is the number of times that the finding served as a basis for the ultimate conclusion of injury in the sixty-eight “contested” cases.

¹⁷⁴ Legal basis *c1* is comparable to economic basis *3* inasmuch as the extent of response of a trader to a profit incentive will be reduced as the amount of the profit becomes so small as to be considered hardly worth taking. The two bases, however, are not completely balanced, and the economic basis includes cases not covered by the legal basis.

¹⁷⁵ If the price advantage is the result of cost savings, there is no discrimination in the economic sense and thus no “preferential” aspect.

¹⁷⁶ The comparability would not apply, however, in those legal cases where the price discriminations were offsetting rather than cumulative. If a price discrimination is offsetting, there is in fact no preferential status attributable to it. While a cumulative aspect has been found in some legal decisions, the possibility of offsetting price discriminations has not been explicitly considered.

¹⁷⁷ These conclusions are based on the concepts of injury as enunciated in the findings, without passing on whether the concepts were appropriate under the facts of the particular cases.

If, however, the seventh economic basis is broadened to include any substantial preferential status, an additional 39 of the legal bases had comparable economic bases. This addition brings the number of legal findings with comparable economic bases to 72 of 102 such findings. The addition also brings the number of decisions where one or more supporting findings had comparable economic bases to 55 of the 68 contested decisions where injury was found.¹⁷⁸

Problems would still exist, of course, even if only the economic tests were accepted by the Commission as bases for findings of injury to competition. For example, to the extent that cost savings exist but cannot be proved, enforcement of the act itself creates an injury to competition (and, as in most cases, to a competitor as well) through effect 3 or 7. Thus, if a buyer's method of operation results in savings to his suppliers, the savings might not be fully demonstrable under the cost justification proviso of the act. To the extent that there are undemonstrated savings which would otherwise be passed on through the operation of competition on the sellers' side, the law does not allow these efficiencies at the prior level to be effective in the selective process by which the less efficient are eliminated. For this reason, there is need for research as to the adequacy of the cost defense procedure in protecting against this type of injury to competition. If cost defenses cannot be made adequately available, the Commission should attempt to avoid the selection of cases where enforcement of the act would be likely to result in this kind of injury.

It might be objected that application of the tests suggested in this Article might result in less efficient methods of business being able to survive the competitive struggle, when the price discrimination might have speeded them on their way to their rightful destiny of failure. But while some of those who "ought not to survive" might be allowed to have life for some additional period of time, they will eventually be eliminated by the normal selective forces of competition. Thus, the price discrimination would have accomplished nothing in the weeding-out process that would not eventually have been accomplished by the forces of competition alone. Furthermore, the existence of such a discrimination places the competitive struggle on an unequal basis, where we cannot be confident that those eliminated would, in reality, not have survived on the basis of efficiency in the absence of the discrimination.

Some of the findings which have led the Commission to conclude that there has been no injury to competition are of such a dubious na-

¹⁷⁸ See note 177 *supra*.

ture that the ultimate conclusion, too, is tenuous. For example, if the price differential is between clearly separated markets which are not in competition with each other, there is, of course, no possibility of injury at the secondary level; but a separate analysis of the facts at the primary level is necessary to reach a conclusion there. Where the conclusion of "no injury" is based on the availability of the price advantage to the "average" firm or a majority of the firms, injury to competition may nevertheless occur to the extent that nonaverage or minority firms would have survived in the absence of the discrimination. Or where the conclusion of "no injury" is based on a lack of causal connection between a higher price for a part and the price of the assembled product, injury to competition may continue to the extent that the price discrimination in parts was cumulative and that higher discriminatory prices on some parts were not offset by lower discriminatory prices on other parts. Or where the direction of market-share changes supports the inference of "no injury," competitive injury may still take place to the extent that large, dominant firms use price discrimination to hamper expansion of their competitors.

A further question which arises is whether, where the "injury" is due to price cutting or collusion, incidentally resulting price discrimination should be used to establish jurisdiction for legal proceedings.¹⁷⁹ In such cases, the real cause of injury might still exist in the absence of the price discrimination, and the latter might merely be a side result. However, in addition to being a result, the price discrimination might also be a cause, in that it might contribute to, make more effective, or even be *necessary* to, the collusion or price cutting.¹⁸⁰ If this is true, to attack the conspiracy or price cutting through an assault on the price discrimination is clearly appropriate.¹⁸¹ Such assaults should be made, of course, only in cases where injury to competition in the broad, economic sense is being effected. Collusion as to price always has economic effect 4. If price discrimination is necessary to it, or makes it more effective, an attack on the discrimination is justified. Selective or geographical price cutting, however, may or may not have bad effects on competition in the broad

¹⁷⁹ See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 218-19 (1955).

¹⁸⁰ McKie has illustrated the force of the Clayton Act in making competition more effective in the metal container industry. See McKie, *The Decline of Monopoly in the Metal Container Industry*, 45 AM. ECON. REV. 499 (Supp. 1955).

¹⁸¹ If price discrimination is a symptom of monopoly power or collusion, several reasons may exist which make an attack on the basic evil undesirable. The monopoly power may be accompanied by offsetting advantages to the economy, such as efficiency. Or the radical approach may be ineffective, perhaps because the monopoly is based on a legal patent, or because of the lack of an effective legal remedy, or because of the difficulty of enforcing an order "not to conspire."

sense. Whether to attack these forms of price discrimination depends not only on whether the discrimination is necessary to the price cutting but also on whether the price cutting is predatory or repressive. Certainly, the law of price discrimination should not be used to prohibit promotional price cutting, which cannot injure competition in the broad sense—though it may speed up or intensify injury to superseded competitors.

Apart from its use as a possible legal justification for price differences, does the “meeting of competition” by a firm throw any light on the question of injury itself? In the initial decision in *Anheuser-Busch, Inc.*,¹⁸² the hearing examiner wrote: “I believe there is a fair implication in *Staley* and *Standard Oil*, that Section 2(b) was intended not to absolve price discrimination for aggressive purposes but is limited to and available only to retain business.”¹⁸³ Actually it is doubtful that there is a real possibility of “meeting competition” aggressively, since merely “meeting” would hardly accomplish the purpose, and “beating” would be required to aggress. Instead of the aggressive meeting of competition, it is likely in such cases that there is really collusion, as in the basing-point cases, or else that there is actually a “beating” of competition, as in *Anheuser-Busch*. If there is collusion, then competition is injured to the extent that the collusion is effective. If there is “beating” of competition, competition, while obviously injured in the narrow sense, may also be injured in the broad sense. If the price cutter is much larger, much more widespread, or much more diversified, the discrimination may be predatory or repressive in effect. If, on the other hand, the disparities between the firms are not great, this “beating” of competition is to be welcomed as evidence of a healthy state of rivalry.¹⁸⁴

Finally, while “defensive” meeting of competition currently provides a legal defense to the charge of a price difference, it may—at the same time—provide evidence that the effect of the difference is to injure competition in the broad sense. There is nothing objectionable per se in a firm’s meeting competitive price bids to individual customers or meeting local competitive situations so as to maintain a share of the business in lower-price markets without sacrificing part of the larger profits available in higher-price markets. If practiced

¹⁸² 54 F.T.C. 277 (1957).

¹⁸³ Id. at 292.

¹⁸⁴ If there had been less disparity of power in *Anheuser-Busch*, the rival brewers might have retaliated by matching or beating the price cut. *Anheuser-Busch* had shown that it was able and willing to meet or beat such retaliation and to maintain the price cuts for a longer period of time. Thus, there was no effective downward pressure on the price level, and eventually *Anheuser-Busch*’s prices were raised.

by a firm whose size, geographic dispersion, and product diversity are not greatly larger than those of its competitors, there will be no substantial injury to competition in the broad sense. If, however, such a defensive meeting of competition is practiced systematically by a dominant, more widespread, or more diversified firm, the effect will be to injure competition in the broad economic sense by the repression of competitors who attempt to gain business by price cutting.

How can Government Best Promote an Effective Market System?

(By ROBERT C. BROOKS, Jr.,^{*} VANDERBILT UNIVERSITY)

"DIRECT attacks on excessive market power are superior to attacks on power-dependent market practices which have acquired bad reputations." In various forms, this has become a commonplace saying in the field of industrial organization. In his widely used textbook, Clair Wilcox characterizes Kaysen and Turner's *Antitrust Policy*¹ as a proposal that, in dealing with problems created by a firm's great size, and also in dealing with prospective mergers, the focus of the law be shifted from market conduct to market structure. In principle, the proposed approach is said to go to the heart of the monopoly problem.²

By way of exception, Joe S. Bain has staked out a small claim in antitrust enforcement territory for a market conduct approach, singling out predatory and exclusionary tactics as involving the one main aspect of market conduct where some empirical association to structure and performance may be established.³ A cloud, however, would be placed on the validity of even such a limited claim, and it would be relegated to the netter regions of theoretical possibilities having no practical status in reality, to read Turner's

*Some of this material was presented in a paper read at the 1967 Meeting of the Southern Economic Association in New Orleans, or previously appeared in *The University of Pennsylvania Law Review*, 1967. The research on the Anheuer-Busch case was sponsored by the Ford Foundation Research Workshop in Marketing, Institute of Business and Economic Research, University of California, Berkeley, and I am grateful for the opportunity of doing among the participants. While some of the results were reported in a publication of the Workshop, the revision has been so substantial that the earlier statement should not be taken as a substitute for this, even in regard to individual parts.

position in a later article. Declaring that "few or no verifiable examples" of predatory pricing have come to light, Turner cites as proof-text a quote-of-a-quote by M. A. Adelman: "Many good people know of innumerable examples; Will Rogers said the trouble with most folks was not that they were ignorant, but that they knew so many things that weren't so."¹⁴ This latter statement does not neatly dispose of the question, however. Rather, it joins the issue, for Bain makes the further statement that "there is evidence concerning a number of individual industries in which 'successful' predation and exclusion have had substantial direct effects on structure and indirect effects on performance."¹⁵

Reasons for such conflicts in estimated frequency of validated predatory pricing cases, as well as reasons for conflicting appraisals of specific cases of this type, are found in a study of the record and briefs of *Anheuser-Busch*. Since both structure and conduct are involved, analysis of this case also illustrates some relative weaknesses of the structural approach—partly due to the nature of economic analysis and partly due to the nature of legal procedure.

VIEWS OF COMMENTATORS AND COURTS

In the minds of many, *Anheuser-Busch* simply illustrates another unfortunate instance of the government enforcing the Robinson-Patman Act against a firm which was trying to compete for more business by cutting prices in a local market. Since the attempt was successful, and competitors lost business as a result, the government erroneously took action, as it is said to have often done, because it confused this "injury to competitors" with "injury to competition." Frederick M. Rowe discusses this case under a heading abbreviated as "Non-Predatory Individual Pricing." The FTC's *Anheuser-Busch* litigation is characterized as a "temporary relapse into the 'diversion' of business approach." "In *Anheuser-Busch*, the Commission condemned a geographic price cut for Budweiser beer in St. Louis because of its inroads on some regional brewers' local business."¹⁶ The price of Budweiser was temporarily cut "to counter declining national sales suffered after a general price rise in 1953."¹⁷ According to Rowe, the Commission's decision was based on a finding of "diversion" alone. He makes recognition that the hearing examiner's Initial Decision had viewed the cut in price as predatory and punitive in motivation, adding in a footnote that, "The examiner's conclusions were apparently influenced by testimony of Anheuser-Busch's president that the company might not have 'done anything' if these regional com-

petitors had also raised their prices in 1953."⁸ He had already telegraphed the thrust of his punch, however, in a footnote to an earlier discussion of another case. "In the Anheuser-Busch case, the examiner's report vacillated between the premise that 'Intent to eliminate a competitor . . . is immaterial' and colorful charges that the reductions were also intended 'to punish (Anheuser-Busch's competitors) for refusing to increase prices when A.B. did so in the fall of 1953.' (54 F.T.C. 277, 291-292 [1957])."⁹

But, in the eyes of Rowe, far from being anticompetitive, Anheuser-Busch ("AB" hereafter) was perhaps the *only* vigorously competitive factor in the St. Louis market. A failure of AB's rivals to meet its price *cuts* (in 1954) is cited in connection with the statement, "A seller's prices are also not causally chargeable with any market dislocation stemming from his rivals' own competitive inertia."¹⁰

As noted by Rowe, the hearing examiner had seen—or imagined—more than a diversion of trade in the AB case. As stated in two widely separated portions of the examiner's Initial Opinion:

Although A.B. was not struck, it, too, signed a wage-increase contract, and, as a result, on October 1, 1953, it and its Milwaukee 'national' beer shipping competitors increased prices generally in varying amounts, depending upon locality. The three St. Louis brewer competitors of A.B. . . . did not follow this raise in prices or make any increase in prices, continuing to sell in the St. Louis market (St. Louis and St. Louis County) at \$2.35 per 24, 12-oz. case . . .¹¹

. . . these price reductions (by A.B. in 1954) were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when A.B. did so in the fall of 1953. Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed A.B. up with price increases in March 1955. . . .¹²

This allegation by the hearing examiner was not specifically included in the Commission Opinion, however (more on this opinion later), and would appear discredited on the basis of the following fact, which finds expression in the subsequent decisions of the Seventh Circuit and of the Supreme Court, which heard the case on appeal. As stated by the Seventh Circuit, when the national brewers increased their prices in the fall of 1953, "*neither AB nor its three local or regional competitors in the St. Louis area increased their prices on sale; in the St. Louis market.*" (Emphasis added).¹³

The fact also finds expression in the Supreme Court decision, which reversed the Court of Appeals on the meaning of "dis-

crimination," and did not decide on the question of injury. In the Supreme Court decision, the statement, "In 1953, most of the national brewers, including respondent, . . . put into effect a general price increase," includes the following as a footnote:

Respondent maintains—and petitioner agrees—that the evidence establishes that it did not raise its prices in Missouri or Wisconsin. In view of our disposition of the case, this is immaterial to the issue presented on this review.¹⁴

The case was remanded to the Seventh Circuit for what was to be the final judicial review of the evidence on the question of injury. This time, the Seventh Circuit reversed the FTC on the merits of the case, seeing only a forthright meeting by AB of "robust competition in the St. Louis market."¹⁵ The litigation was ended when the Solicitor General declined the request of the FTC to petition the Supreme Court for a writ of *certiorari*.

It was difficult for me to let the issue rest on the apparent premise that the hearing examiner was guilty of an erroneous understanding of the facts and of confusion in inferring that AB's three rivals in St. Louis were being punished for failing to follow a price rise that did not, in fact, occur, as far as the St. Louis market was concerned. I decided to make a study of additional material on the case which is less readily available than the decisions—the transcript of record of the hearings, and the briefs submitted by counsel on both sides.¹⁶

The record shows, early in the hearings, the fact that there had been no increase in St. Louis at the time of the general increase in the price of Budweiser after the strike in the fall of 1953.¹⁷ The hearing examiner, however, was apparently unaware of this fact, or simply ignored it, when he wrote his Initial Decision.

On review of the case by the Commission, the apparent inconsistency of the facts with the allegation of a punitive motive had been noted, for, in answer to an inquiry by a Commissioner, counsel for the Commission indicated that there was no evidence of a punitive or predatory motive on the part of AB.

Although there is a mention of "retaliation" in the government brief for the review by the Commission, there was no mention of "retaliation" by government counsel in the oral argument. In the oral proceedings, the counsel for AB had stated:¹⁸

Now with respect to the punishment point: Commission counsel in effect concedes that this phase has dropped out of the case. In our brief we submitted detailed facts showing that the examiner was wrong on his facts. He assumed that we had raised prices in St. Louis

in October '53, when, in fact, we didn't. And his assumption was that we went down because the St. Louis competitors refused to follow us up. We will point that out in our brief. We point out that the major premise being wrong, the argument is wrong, and false. Counsel in his brief has not taken issue with our analysis of the facts, and, in fact, he has reduced in his brief to stating that it can be urged that this is retaliation.

Later, referring to "the increase they made to absorb the increases of the labor contract," Commissioner Secrest asked, "When their competitors did not do that—they merely went back to where they were before?" Government counsel replied, "Not quite, sir. In St. Louis, you see, Budweiser never did increase its prices."¹⁹ Whether counsel had not understood the reasoning of the hearing examiner, whether he saw the apparent flaw, or whether he wished to avoid undertaking the proof are matters for speculation.

The Opinion of the Commission is unclear on the point of whether or not AB's motivation was punitive. In briefs to the courts on appeal of the case, counsel for AB pointed out the apparent error of the hearing examiner and the omission from the Commission decision of any reference to any alleged punitive motive, while the government maintained that the Commission decision had accepted the hearing examiner's "findings in respect to competitive injury."²⁰ As stated in a footnote to the decision of the Supreme Court:²¹

There is a dispute as to whether the Commission adopted a finding by the examiner which related to the purpose of the price reductions. Since we conclude that the issue of predatory intent is irrelevant to the question before us, it is unnecessary for us to resolve this dispute.

Thus, not only in the Initial Decision, but also in the FTC's later briefs on appeals of the case to the courts, there were allegations of a punitive motive for AB's price cuts. Why did the allegations persist, and why were they not accepted?

CONFUSION IN THE LOGIC OF THE INITIAL DECISION

The hearing examiner's Initial Decision ignored the fact that there had been no price increase in St. Louis at the time of AB's general price increase on October 1, 1953. The Initial Decision contains no specific reference to AB's prices in St. Louis prior to December 31, 1953. It did seem to say, however (see quotations above), that AB had unsuccessfully attempted to lead prices

upward in St. Louis as well as elsewhere, and then proceeded to punish the St. Louis brewers for their failure to follow up by subsequently cutting prices in St. Louis (successive cuts were made on January 4, 1954, and on June 21, 1954). The whole rationale appears devastated by the fact that St. Louis had been an exception to the general price increase after the 1953 strike.

Review of all the facts of the case shows that the confusion was due to a failure of the hearing examiner to distinguish between "the St. Louis market" (St. Louis and St. Louis County), and "the market served by the three other St. Louis brewers"—Falstaff, Griesedieck Western (GW), and Griesedieck Brothers (GB)—each of whom sold in from thirteen to twenty-six states.²²

There were actually three patterns of pricing over time within the market for which AB competed with its smaller St. Louis rivals: (1) In "the St. Louis market" AB did not increase its prices after the 1953 strike, but made two successive price cuts in 1954. (2) In the rest of Missouri, AB neither increased nor cut prices during this period. (3) In other states served by the rival St. Louis brewers, AB increased its prices after the 1953 strike, but was not followed by its smaller St. Louis rivals. In at least one instance in Illinois, AB's increase was subsequently rescinded.²³ Thus, while the hearing examiner made statements which were consistent with the record of the case, his failure to specify the *loci* of the price changes made him appear to be in error in his understanding of the facts of the case. Let us take his statements quoted earlier, and insert (in capitals) the additions needed to make the statements explicit. By reading the statements both with and without the additions we can see how specification of the *loci* of events would have made both the logic of the argument and its consistency with the facts quite clear:²⁴

Although A.B. was not struck, it, too, signed a wage-increase contract, and, as a result, on October 1, 1953, it and its Milwaukee 'national' beer shipping competitors increased prices generally in varying amounts, depending on locality. (WHILE A.B. DID NOT INCREASE PRICES IN ST. LOUIS OR IN ST. LOUIS COUNTY, IT DID INCREASE PRICES IN OTHER PARTS OF THE TERRITORY IN WHICH IT COMPETED WITH ITS THREE ST. LOUIS BREWER COMPETITORS.) The three St. Louis brewer competitors of A.B. . . . did not follow this raise in prices or make any increase in prices, continuing to sell in the St. Louis market (St. Louis and St. Louis County) (AND ALSO IN THE REST OF THE TERRITORY IN WHICH THEY COMPETED WITH A.B.) at \$2.35 per 24, 12-oz. case. . . .

. . . these price reductions (IN 1954 BY A.B. IN ST. LOUIS AND ST. LOUIS COUNTY) were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices (IN OTHER PARTS OF THE TERRITORY IN WHICH THEY COMPETED WITH A.B.), when A.B. did so (IN PARTS OF THE TERRITORY OUTSIDE OF MISSOURI) in the fall of 1953. Apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed A.B. up with price increases in March 1955. . . .

As actually expressed in the Initial Decision, the hearing examiner's findings relative to the question of injury seem limited to the St. Louis market. In this connection, the Decision lacks a clear statement of what happened outside of St. Louis: of AB's lead-up outside of St. Louis, and of the failure of the other St. Louis brewers to follow AB's lead-up outside St. Louis.

Both the legal tendency to limit evidence and the economic tendency to think in terms of a single-market model appear to have been particularly unfortunate in the various attempts to assess the facts of the *Anheuser-Busch* case.

SOME SINS OF COMMISSION

In addition to the sin of omission discussed earlier—the failure to specify the loci of the price changes and responses—the Initial Decision further obscured the issue of "injury to competition" by inclusion of considerable material which, at least in an economic sense, is far less persuasive than the reasoning which was so clouded by a lack of explicit detail. It should be recalled that this paper is concerned with the question of "injury," largely omitting reference to aspects of the case not related to this question.

While evidence of what happened *outside* St. Louis is crucial to an understanding of the nature of the injury to competition *within* St. Louis, the Initial Decision makes use of this evidence only in connection with statements that there was a *potentiality* of losses, "if any," being subsidized by AB's profits from other markets where higher prices were maintained. In the Initial Decision's discussions specifically concerned with what happened in markets *outside* of St. Louis, there is no mention of AB's attempted upward price lead in those markets. The reference to a "price raid" in describing the cuts within St. Louis further reflect a glossing over, if not an overlooking, of a punitive or retaliatory motivation for the cuts. The punitive aspect is mentioned at only one point in the entire decision.²⁵ The "possibility of subsidization" might

have been used, as is indicated later, as one of the bases for inference as to the effects of AB's price cuts in St. Louis. Instead, its use in the Initial Decision is limited to the position that the price cuts²⁶

are not violations *per se*, they are violations only in comparison with the maintenance of higher prices elsewhere, whether premium or not, because such maintenance enables AB to continue profitable operation in more than 90% of its business, to subsidize less profit or even no profit on its operations in the St. Louis market, and if competitor injury occurs there, violation of the charging law is *prima facie* made out. (Emphasis added. Note the comments of the Seventh Circuit, reported in the next section of this paper.)

Furthermore, the Initial Decision seems almost preoccupied with diversion of trade as a standard of injury, and so large a proportion of the decision is devoted to this question that it appears to be the primary basis for the findings of injury. From an economic standpoint, the important question has nothing to do with how much trade was diverted from one competitor to another, since this would be influenced by many things other than the setting of a discriminatory price.²⁷ The important criterion of injury is whether competitive impulses and the forces of competition, in general, are strengthened or repressed.

REVIEW ON APPEAL

Before the appellate courts, the government maintained the allegation of a punitive motive for AB's price cuts, citing the following words from the Commission decision: "We believe that the hearing examiner's findings in respect to competitive injury are amply supported by the record and free of error."²⁸ The Commission decision, however, had not made specific reference to the post-strike price increase by AB outside Missouri, to the failure of the three other St. Louis brewers to follow this increase, or to a punitive motivation on the part of AB. (The almost immediate follow-up, by Falstaff, GW, and GB, of AB's *later* price increase had been mentioned, but without comment).²⁹

Only in a later section—a section dealing not with the question of injury but with AB's contention that it was meeting competition in good faith—did the Opinion allude to facts which might have supplied a motivation for punitive price cuts: "Respondent argues that, while not losing sales in the St. Louis area, it had been having decreases in sales volume in other markets served by its St. Louis plant"³⁰ (emphasis added). Unfortunately, these facts had

not been considered in terms of the motivation they supplied AB—to retaliate through punitive price cuts in St. Louis, since the loss of sales had been due to the failure of the St. Louis rivals to follow AB's upward lead outside St. Louis. The Opinion considered them only in terms of the position that "good faith meeting of competition" serves as a Robinson-Patman defense only when its purpose is defensive rather than aggressive, stating: "This, however, would not justify the lowering of prices in the one market in which respondent had experienced no losses."³¹

When the case came before the Seventh Circuit on appeal, the failure of the Commission Opinion to make specific reference to punitive motivation may well have been attributed to government counsel's reactions to questions put to him by Commissioners during the oral proceedings in Commission review of the Initial Decision. Perhaps not understanding fully the economic aspects, perhaps unaware of the hearing examiner's rationale for the finding, counsel did not support the allegation of a punitive motive on the part of AB, even though there was reference to "retaliation" in his brief.

While it was maintained in later government briefs, the failure of the hearing examiner to make explicit the basis for his finding of a punitive motivation for the price cuts, the apparent forfeiting of the point during Commission review of the Initial Decision, and the subsequent glossing over of the finding by the Commission—all tended to discredit its validity. Since the hearing examiner's exposition of events was confused by a failure to distinguish between "the St. Louis market" and "the market served by the St. Louis brewers," the hearing examiner himself appeared to have been in error because of his failure to make this distinction.

Although the Seventh Circuit, in its first disposition of the case, saw no need to come to grips with the question of competitive injury, it sought to correct the apparent error by adding the following statement to the discussion of the general price increase after the strike in the fall of 1953:³²

However, neither AB nor its three local or regional competitors in the St. Louis area increased their prices on sales in the St. Louis market.

In this first decision, the court ignored AB's increase *outside* Missouri, and the failure of Falstaff, GW, and GB to follow. In its second decision, the Seventh Circuit amplified its clarification to include all the key facts:³³

In the Fall of 1953, after an increase in costs due to a new wage contract, AB increased the price of Budweiser 15¢ a case in all markets

except those in Missouri and Wisconsin. . . . Falstaff and AB's other St. Louis competitors . . . chose to absorb the increased costs, and did not raise prices in any market in which they did business.

The key facts were now explicit, but the logic of the hearing examiner remained in its original form. This final decision by the Court of Appeals included no attempt to redeem the enigmatic exposition of the Initial Decision by dubbing in the facts the Court had so recently made explicit. Because of his failure to distinguish the loci of the successive price changes, it may have seemed difficult to judge with assurance what was really in the mind of the hearing examiner. In view of the history of apparent confusion, the finding was suspect, and support for its inclusion in the decision was debatable. The Initial Decision's emphasis on the possibility of AB's "subsidization" of the St. Louis price cuts,³⁴ and its preoccupation with statistics showing "diversion of trade," did not help the government's case. In the words of the Court, "the inferences on which the findings of the Federal Trade Commission were based are so overborne by evidence calling for contrary inferences," the findings were not deemed by the court to be supported by substantial evidence.³⁵ (Under the Administrative Procedure Act §10, 60 Stat. 243 [1946], 5 U.S.C. §1009 [1958], the courts are directed to set aside agency findings "unsupported by substantial evidence . . ." or "unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.")

The Court specifically rejected the position that the case involved a "predatory pricing practice," noting that the shift in volume was temporary, that there was "no showing that AB had aid from its other markets," and that "AB used restraint in its competitive efforts." The Court saw a clear distinction between AB's conduct and that involved in cases cited as predatory pricing precedents where "the motive for the price cut was vindictive and the effect was punitive."³⁶

SUPPORT FOR THE ALLEGATION OF A PUNITIVE MOTIVE

What support does the record of the case contain for the "clarified" findings of the hearing examiner?

August A. Busch, Jr., president of AB, testified at the hearings that October, 1953, was the first time he could remember in the history of the brewing industry when, after the large brewers increased their prices, the locals and regionals in some areas did not increase their prices.³⁷ In response to a question, he replied

that he imagined AB wouldn't have done "anything" (in St. Louis) if the regional St. Louis brewers had raised (in response to the increase by the large brewers outside St. Louis), but added that he didn't see the "connection."³⁸

Mr. Busch had known that Falstaff's and AB's labor contracts were to run out at the end of the calendar 1953.³⁹ Perhaps AB delayed pricing action until the end of 1953 in the belief that the large brewers' price increase would be followed at the expiration of the Falstaff, and perhaps other, labor contracts. When this expectation was not fulfilled, AB made its initial price cut in the St. Louis area. This price cut was recommended by the sales manager of AB's Midwest Region, which included Missouri, Kansas, Iowa, North and South Dakota, and Minnesota.⁴⁰ This initial cut, which reduced the premium on Budweiser to 33 cents, was fairly effective, but the subsequent cut, on June 21, 1954, which eliminated the premium, was much more effective, as the following tabulation from the initial Decision shows.⁴¹

TABLE I
PERCENTAGE SHARES OF THE ST. LOUIS MARKET

Brewer	12-31-53	6-30-54	3-1-55
AB	12.5	16.55	39.3
GB	14.4	12.58	4.8
Falstaff	29.9	32.05	29.1
GW	38.9	33.00	23.1
All Others	4.8	5.82	3.9

In many other areas the local and regional brewers did not follow the large brewers' price increase after the 1953 strike.⁴² Brewers in Ohio, Michigan, and Philadelphia were among those who did not follow the price increase.⁴³ AB rolled back its price increases in Memphis (part of the regional St. Louis brewers' territory), in Ohio, and possibly in other areas.⁴⁴ In the testimony of Mr. Busch, the increase in the price of Budweiser, which was not followed by local and regional brewers in Ohio, had caused the premium on Budweiser in Ohio to increase from 5 cents to 10 cents in sales at taverns and bars. Since these retailers were reluctant to give up the higher margin which had been established, it took two years after the roll-back finally to bring the premium on Budweiser back to 5 cents a bottle.⁴⁵

As for St. Louis, after eight months of selling Budweiser at the same price as the beer of the regional competitors, AB, on February 16, 1955, announced a price rise to take effect on March 1.⁴⁶ All the other St. Louis brewers except GB also announced

increases for the same date.⁴⁷ After the announcements of Falstaff and GW, GB announced on February 23, exactly one week after AB announced; the increase in GB prices was to be effective on March 7.⁴⁸

AN EVALUATION OF ALTERNATIVE INTERPRETATIONS

The main result of this analysis of *Anheuser-Busch* has been to show that, contrary to judgments in the literature of industrial organization, the hearing examiner's finding of a punitive motive was consistent with the evidence in the record, and was not simply an illusion based on erroneous understanding of the facts or on confusion as to the locus of a price increase that had *not* occurred in the market with which the case was concerned.

The evidence is, of course, also consistent with interpretations other than that of the hearing examiner. Corwin D. Edwards has noted that "it is possible to impute to Anheuser-Busch such purposes as experiment with a new price policy, attainment of a better balance of sales in different areas, or maintenance of the volume of production in the St. Louis plant."⁴⁹ Nevertheless, such other purposes, even if present, hardly provide sufficient basis for dismissing the statements of AB's president and the other evidence of a co-existent punitive motivation as well.

As far as a purely *punitive* aspect is concerned, it would probably have been a matter of indifference to AB as to where the cut in Budweiser prices would be made, so long as it was in the territory shared with the three St. Louis rivals who had failed to follow AB's upward price lead. Perhaps the difficulties encountered in rolling back prices in Ohio, another area where an upward lead by AB was not followed, argued against making the cut in that part of the territory where Budweiser prices had recently been increased. Perhaps it was also feared that a punitive or predatory intent was more likely to be attributed to their price cut if it was in a part of the territory where AB had shortly earlier made an unsuccessful attempt to lead upward, thus increasing the risk of litigation by government regulatory agencies. Perhaps the close control of the distribution channels because of direct selling by AB in St. Louis and St. Louis County was an important consideration in the choice. Many economic factors having nothing to do with repression undoubtedly entered into AB's decision, but the possibility of the action having a substantial repressive motivation remains.⁵⁰

Even, however, if AB's *intent* was not to repress competitive

impulses of smaller rivals in the St. Louis area, there are strong indications that this was the effect. Although intent may be one of the best indications of effects, the legal standard of injury in the Robinson-Patman Act is in terms of effects themselves.⁶¹

Even if AB sought only to develop volume with its price cuts, the immediate response of the rival St. Louis brewers to the subsequent price increase by AB in St. Louis was to follow this later price lead. Their decision to narrow the spread between their prices and AB's to less than any of the prior differentials in the St. Louis market—to less than the amount which on the basis of past experience appeared to keep their trade from being diverted to AB—certainly indicates that AB's price cutting had had a repressive effect on its St. Louis rivals, whatever the intent (see Table 2). This response by the regional St. Louis brewers to AB's price increase in St. Louis stands in sharp contrast to their behavior when AB and the other national brewers had effected the general price increase 16 months earlier in other parts of their territory outside of Missouri and Wisconsin. It should be remembered that, on the earlier occasion, AB's St. Louis rivals had sought to increase their

TABLE 2
PRICES OF BEER IN THE ST. LOUIS MARKET
(24, 12 oz. case)

Time	AB price	Rivals' price	AB premium (in cents)
Pre-strike	\$2.93	\$2.35	58
After wage increase	2.93	2.35	58
After initial AB cut	2.68	2.35	33
After second AB cut	2.35	2.35	0
After AB increase followed by rivals	2.80	2.50	30

volume by holding their old prices, even though they also faced the increase in wage costs which accompanied the upward price lead of their national competitors.

When, 16 months later, AB made its price increase in St. Louis, the cost structures anticipated by the smaller brewers were, as far as the record of the case discloses, still the same as at the time of AB's earlier increase outside St. Louis, and their overall levels of output were certainly no greater. Under the hypothesis that there was no intervening reduction in the vigor of their competitive seeking of trade, there would have been no more reason than before for them to follow AB's lead. If anything, there would have been even less reason to follow the lead in St. Louis, since this time the lead was not overtly coupled with an increase in the cost structure, which apparently had remained at about the same level

for the previous 16 months.⁵² In fact, however, the smaller brewers did follow AB's lead in St. Louis. Their earlier impulse to gain trade by keeping their prices the same, as they had done at the time of the national brewers' increase outside St. Louis, was no longer evident. In the meantime, of course, these smaller brewers had experienced the effects of AB's successive price cuts in St. Louis. This experience could well have led to the apparent weakening of their competitive impulse to keep their prices constant in order to attract business from AB on the occasion of price increases by AB. Indeed, this impulse appears to have been replaced by a desire to *avoid* taking too much business from AB.

Another dimension of behavior through time also indicates repressive effect. When Budweiser was at \$2.93 in the St. Louis area, AB's St. Louis rivals, even though faced with an increase in wage costs, had planned to keep their price at \$2.35. After AB's two price cuts and subsequent increase, however, these smaller rivals then chose to *increase* their prices to \$2.50, even though Budweiser prices in St. Louis were by then at \$2.80—a price lower than the \$2.93 against which the rivals had previously chosen to maintain their price of \$2.35 (see Table 2, above). Absent the intervention of a repressive effect, we should have expected that—with AB's price 13 cents lower than before—the smaller rivals' prices would have tended to be lower, too. In fact, however, with AB's price 13 cents lower than before its cuts, these rivals chose to set their prices 15 cents higher than before the cuts.

FRUITS OF INTENSIVE CULTIVATION

It is unfortunate indeed that, in *Anheuser-Busch*, the most valid basis for a finding of injury to the forces of competition should not have been made quite explicit in all respects. It should have been made explicit in the Initial Decision of the hearing examiner, in the decision of the Commission, and in all briefs of government counsel. The courts should have the benefit of the best possible presentation of both sides of a case.

As we go back from the published decisions and subsequent commentaries to the transcript of the record and briefs, a clearer and more consistent picture of the motivation and effect of AB's price cuts in St. Louis emerges. If the economically relevant facts had been given more emphasis (or had even been mentioned) in the earlier decisions and in the briefs, perhaps the later decisions would have accepted findings which a consideration of all the facts seems to support.

The handling of the AB case suggests that a reading of the decisions and opinions of the Commission and of the appellate courts is not a sure basis for comment on the economic wisdom of the decisions or on the economic facts of the case, for such decisions result from the adoption of one of two adversary positions regarding the meaning of the evidence. Even if the position adopted by a decision is assumed correct, the wording is sometimes misleading to a reader who lacks the context provided by the record. Troublesome though it may be, recourse to the record and briefs of the case is necessary.

THE TRUTH—MORE OR LESS

Perhaps the quotation of Will Rogers that "the trouble with most folks was . . . that they knew so many things that weren't so," cited by Turner, might better be paraphrased as, "The trouble with most folks is that they know so many things that *may or may not* be so."⁵³ While his article contains more than one reference to Anheuser-Busch, Turner's position on predatory pricing suffers from a failure to consider all the source material. Similarly, Turner relies on M. A. Adelman's work for his comments regarding the A&P case, and there is no evidence that the "adversary" positions of Dirlam and Kahn⁵⁴ or R. F. Lanzilotti⁵⁵ were even compared.

I am not contending that Turner *should* have considered all the source material, but am simply pointing out a weakness shared by much of the literature on social control of business, including my own. It is appropriate for both author and reader to be aware of such weakness, as each laborer in the vineyard of antitrust must make his own estimates of his productivities at the intensive and at the extensive margin.

SOME VALUES OF THE CONDUCT APPROACH

If a market practice is a symptom of monopoly power or collusion, why not treat the basic cause, and eliminate the power or attack the collusion through the Sherman Act? First, the monopoly power may be accompanied by off-setting advantages to the economy (such as efficiency), and it may be unwise to eliminate the power itself. Second, the radical approach may be ineffective, possibly because the monopoly is based on a legal patent, because the courts will not break up the monopoly firm, or it might be difficult to enforce an order "not to conspire." In such cases, if the symptom (market practice or conduct) is bad in itself, then the symptom should be treated directly. But since

either conspiracy or monopoly power may exist without any manifestation in disreputable practices, there is a need for attacking them in cases where such practices do not accompany them. While direct attacks on structure may be more efficient in general, a conduct approach serves to fill in important gaps and weaknesses.

Perhaps the most important way government can help promote an effective economic system is a type of "conduct approach" about which there is so little to be said, that it might be taken for granted and overlooked. Historically, the first fields to be put under cultivation in Central Europe, in superficial contradiction to Ricardo's theory of rent, were not the more productive areas in the valleys, but less productive areas in the hills. The latter fields were initially chosen because they would be easier to defend; use of the more productive fields had to await the arrival of law and order.⁵⁸

NOTES

1. Carl Kaysen and Donald F. Turner, *Antitrust Policy* (Cambridge: Harvard, 1959).
2. Clair Wilcox, *Public Policies Toward Business*, 3rd ed. (Homewood, Illinois: Irwin, 1966), pp. 840-841.
3. Joe S. Bain, *Industrial Organization* (New York: Wiley, 1959), pp. 422.
4. Donald F. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," *Harvard Law Review*, 78 (May 1965), p. 1344.
5. Joe S. Bain, *Industrial Organization* (New York: Wiley, 1959), pp. 422-423. I have argued elsewhere that structure and performance have also been affected by another type of market conduct. In certain cases, a volume discount structure (a classic form of the "market practice") can serve as a substantial barrier to access and entry: Brooks, Robert C., Jr., "Volume Discounts as Barriers to Entry and Access," *Journal of Political Economy*, LXIX (February 1961).
6. Frederick M. Rowe, *Price Discrimination under the Robinson-Patman Act* (Boston: Little, Brown, 1962), pp. 158.
7. *Ibid.*
8. *Ibid.*, p. 159.
9. *Ibid.*, note 42 at p. 149.
10. *Ibid.*, note 130 and accompanying text, at p. 165.
11. 54 F.T.C. 277, 281 (1957).
12. *Ibid.*, p. 292.
13. 265 F. 2d 677, 680 (1959).
14. 363 U.S. 536, 539 (1960).
15. 289 F. 2d 835, 842 (1961).
16. I was rewarded by discovering, among other things, some personally surprising statistics on beer consumption by regular patrons of neighborhood taverns, and also what happens when a beer is "wild!"
17. TR 22-23. The following abbreviations will be used: TR for transcript of record; ID for the initial decision of the hearing examiner; CD for the decision and Opinion of the Commission.
18. *Ibid.*, 26.
19. *Ibid.*, 52.
20. 54 F.T.C. 277, 301 (1957).

21. 363 U.S. 536, 545.

22. TR 25.

23. TR 359, 392, 432, 466.

24. 54 F.T.C. 277, 281, 292 (1957);

25. ID 291-292.

26. ID 287-288.

27. For example, GB lost more volume outside St. Louis, where Budweiser prices were not cut, than in St. Louis, where Budweiser prices were cut (TR 337). There was a change in the process used, and thus in the product made, by GB in early 1954 (TR 339), the same general period that the price cuts in Budweiser were made. In 1954, there was as much decline in *draft* GB sales, where the price to the consumer for all St. Louis beers, including Budweiser, remained at 10¢ (TR 191-192), as there was in *package* GB sales (TR 340). Perhaps for these reasons, GB was a week late in following AB's 1955 price rise (TR 306-307 and 340).

28. CD 301.

29. CD 298-299.

30. CD 301.

31. *Ibid.* The decision also maintained the examiner's realistic position that AB was not simply "meeting competition." In view of the clear cut evidence of a quality differential in the opinions and beliefs of beer consumers, AB was not just *meeting*, it was *beating* competition, when it eliminated the Budweiser premium over the price of the regional beers (ID 292-293, and CD 301-302).

I have contended elsewhere, however, that the acceptance of even *bona fide* "defensive" *meeting* of competition as a legal defense to a charge of price discrimination has unfortunate aspects from an economic standpoint: ". . . practiced systematically by a dominant, more widespread, or more diversified firm, the effect will be to injure competition in the broad economic sense by the repression of competitors who attempt to gain business by price cutting". Brooks, Robert C., "Injury to Competition under-the Robinson-Patman Act," *University of Pennsylvania Law Review*, 109 (April 1, 1961), p. 832.

32. 265 F. 2d 677, 680 (1959).

33. 289 F. 2d 835, 838 (1961).

34. In connection with the law's concern, not only with actual present or accomplished *injury*, but also with the possibility or probability of future injury, the Court noted that, "The examiner's language confusingly refers to both the alleged *acts* (subsidization of price cuts) of AB and the alleged *effects* (injury to competition in the area of the price cut) of those acts. In our comments we shall attempt to differentiate between the two" (289 F. 2d 835, note 11, at 842-843 (1961)). It should be noted that this *possibility* of subsidization, if needed, could have made the present *effect* of AB's price cuts more repressive. Brooks, Robert C., Jr. "Price Cutting and Monopoly Power," *Journal of Marketing*, 25 (July 1961), pp. 47-48.

35. 289 F. 2d 844.

36. *Ibid.*, 839, 842.

37. TR 934.

38. TR 935.

39. TR. 934.

40. TR 918-919.

41. ID 287.

42. TR 158.

43. TR 169.

44. TR 176.

45. TR 937.

46. TR 870.

47. TR 306-307. Falstaff enjoyed a very large rise in sales in February, because of its announcement of the price rise set for March 1 (TR 224).

48. TR 870. This evidence lending weight to an implication of repressive effect was introduced by AB's attorneys, and government counsel sought to keep it out of the record! If they had been concerned only with economic implications, each side would have been hurting its own case by these actions. It was also AB's attorneys who called the retailer witnesses who supplied the record with data from markets outside St. Louis. The hearing examiner noted later that, "None of this testimony was from retailers in the St. Louis Market (which did and does seem most peculiar to me) . . ." (ID 288).

49. Corwin D. Edwards, *The Price Discrimination Law*. Washington: Brookings Institution, 1959.

50. ID 293-294.

51. See Robert C. Brooks, Jr., "Injury to Competition under the Robinson-Patman Act," *University of Pennsylvania Law Review*, 109 (April, 1961), pp. 795-799.

52. Investigation beyond the record of the case shows that, in fact, there were increases in wage rates every year from 1953 to 1963. While the wage rate increases were, of course, cumulative, it should be remembered that increases in labor productivity would not be reflected in such figures. It is significant that the earlier (1953) increase in wage rates was apparently three to four times the normal annual increase (about 4.5 per cent) from 1954 to 1963, according to industry sources. This additional information outside the record of the case serves to make the rival brewers' motivations less clear, and a finding on such a point would be better based if the record contained information on wage costs per unit of output (not rates per unit of input), and on other costs as well.

53. Donald F. Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," *Harvard Law Review*, 78 (May, 1965), p. 1344.

54. J. B. Dirlam and A. E. Kahn, *Fair Competition* (Ithaca: Cornell University Press, 1954), pp. 211-241.

55. R. F. Lanzillotti, "Pricing Objectives in Large Companies," *American Economic Review*, XLVIII (December, 1958), pp. 921-940; and "Reply," *American Economic Review* XLIX (September, 1959), pp. 679-686.

56. This vivid illustration was suggested to me by Nicholas Georgescu-Roegen. Other examples, but less illustrative of the point made here (again because it is largely assumed), are found in a passage in Alfred Marshall's *Principles of Economics*, 10th ed. (London, Macmillan, 1922), pp. 164-165.

Mr. BROOKS. Well, as I was coming up to the office of the Small Business Committee, I was asking directions. And someone said, "Well, you must be having problems." And I realized from that it is so often that people assume that small businessmen are just coming to Congress to get some assistance, and pleading a hardship case.

It struck me that Americans have the attitude that large firms should just naturally have a hearing for their case, but that is sort of a "privilege" that is granted to small business.

And I think it is also true that many people feel that just because a business is large that it just naturally gets lower prices than a smaller business. They don't even think about the possibility that a company might be able to sell to a small business just as cheaply as to a large business. And I think some firms give low prices to large firms because they assume that large firms should get lower prices, or they imagine that there are cost savings in selling to large businesses. But then if they are asked to come up with the proof of those cost savings, they hunt around and they can't find any.

So they then come to the conclusion that it is very difficult to prove these cost savings.

But I would suggest that these cost savings may simply not exist, and the difficulty of proving them may be because they simply aren't there except in the mind of a company that wants to make a price concession.

Now, I do believe that firms will make concessions to large firms, large buyers, because they are worried about getting the business, and they figure that their competitors are likely to be thinking the same way and are likely to make low prices also; while in the case of a small company they do not expect their competitors to be sharpening their pencils when they come up with a price. And also they feel that if it turns out that competitors are making lower prices, that they will lose one or two, or half-a-dozen, small customers, but that they still have a couple of hundred, or 300 or 400 left that they can keep by reducing their prices as well.

So I think there is a real difference in the way the large firms and the small firms are treated in connection with prices, and that this is not based on cost savings. This may be given as a reason, but this simply doesn't hold water.

Now, when we see that people sort of dismiss the pleas of small business on the basis that they are really coming from complainers, or that they are coming because of the self interest of the small businessman, they are ignoring that all appeals to law are basically complaints, and involve the self interest of the person who is making the appeal. And large business makes such complaints, making arguments growing out of its self interest, and nobody ridicules them or acts as if they have no business doing this. But, with a small firm, oftentimes people don't even consider the rest of the case that they are making.

Now, the large business firm will get a consideration of the rest of its case. Other than the fact that it is interested in the thing, that it is complaining about something, it will automatically get consideration of the other aspects of the merits of its case. And I think that small firms should be able to get a hearing of other aspects of the merits of their case as well.

Now, I also noticed looking over the figures of the *Utah Pie* case that some people would probably say, well, these fellows are making about a 10-percent return on their net worth, and that is really enough, they should be happy with that.

Well, I think you would have to do a lot more analysis of the books of the company to see what kind of return they actually were making. But I know that there are a lot of large companies that will not go into any venture unless they hope to get at least a 20-percent return on their investment.

We also know that automobile companies get returns ranging around 25 or 30 percent, and 1 year even got between 60 and 70 percent return on investment.

Now, it seems to me that in the case of a company like the Utah Pie Co. which was doing such a great job, and doing such a real service for the people in their marketing area, that it just is ridiculous to say that they should be happy with a 10 percent return, when we have other companies that are not nearly as imaginative or careful about satisfying the wishes of consumers that won't go into anything unless they can make more than 20 percent, and others which because of their market situation can make 30 percent or even more.

I also wanted to point out that the critics of Robison-Patman enforcement are very onesided, and never mention any successes, they paint the thing as completely black and white. For example, although they may object to collusion, they don't refer to the cement case, the glucose cases, and other *Robinson-Patman* cases that serve to reduce collusion in this country, which these critics are worried about.

And another thing is that, on this question of predatory pricing, critics of *Robinson-Patman* Act as if they don't believe it ever really happened. Now, for the one who believes there *should* be enforcement against predatory-repressing pricing, the claim is not made that it happens all the time. In fact it is realized that you have to look at the case, and you have to decide whether there is a predatory or repressive effect. And I just think it indicates a lack of real attention to the details, or even the broad outlines, of the cases that causes the critics to make such sweeping statements.

And I think it is because of a lack of real familiarity, and just repetition of what has become almost conventional wisdom. And if you want to attack something, it is so easy to attack *Robinson-Patman* enforcement and not have an argument on your hands. I think if you are feeling sort of mean, this is a very good target for venting your hostility.

I was very happy to notice in the hearings of the Hart Committee that Assistant Attorney General McLaren said that he was not among the critics of the *Robinson-Patman* Act. He also mentioned, however, that he had to take a lot of punishment as a result. In other words, you are not saying the "in" thing if you defend *Robinson-Patman*.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Is it your impression, then, Professor, that in order to be a full-fledged member of the antitrust fraternity, in order to evidence that you possess the requisite intellectual elan, that you have to attack, hopefully with glitteringly elegant phrases, the *Robinson-Patman* Act and its rationale and implementation, and so forth?

Mr. BROOKS. I think this is a safe way to handle it without giving much time to it.

Mr. POTVIN. And one supposes of course that the typical stable of corporate clients would not receive these remarks with any undue amount of pain, or as the chairman has noted, unkind reaction?

Mr. BROOKS. That is right. You are in effect sort of a devil's advocate if you try to defend the Robinson-Patman Act. I think you can safely take sort of a middle position, but if you really come out with a forthright defense, I would say this: that it really bothers me when some attack the act with such abandon, and the defenders are so cautious in their statements. I think that Professor Stigler makes absolutely outrageous statements and gets away with it, and the defenders of the act are very, very cautious, to make sure that they are not misinterpreted about it.

Mr. ODEN. Mr. Chairman.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Professor Brooks, does it seem strange to you, or do you find any incongruity in the fact that the Robinson-Patman Act was passed to stop certain practices by buyers, but yet most critics of the act would rather challenge its effectiveness or challenge its need from the sellers' standpoint, thereby appearing sometimes to totally ignore the reasoning behind the act, and concern themselves only with the primary line injury rather than secondary?

Mr. BROOKS. Well, we do have that, because of "rewriting of the Act," I guess you would say, by economists who are trying to make it what they would like it to be rather than what it actually is. I think that in effect this is a consistent position, because basically they are saying, this is the kind of law we ought to have, we shouldn't have had this law. I think that this is implicitly what they are saying.

Now, I do notice that the suggestions that come out of the Neal report involve quite a bit of consideration to secondary level injury. And yet you get the impression that they are writing the thing so that in practice it will be very difficult to bring secondary injury cases.

Mr. ODEN. It seems that time after time when you read criticisms of the act the critics discuss the disadvantages of the Robinson-Patman Act, or the inconsistencies of the act, in terms of sellers offering discriminatory prices rather than buyers trying to extract these discriminatory prices from sellers.

Mr. BROOKS. Well, this also is on the basis that they fear that the act limits competition, and they are really making a sort of one-sided attack, and they are bringing out the things which they feel are objectionable about the act. Actually, however, prohibiting price discrimination may help to break up conspiracies. It certainly did in the glucose and cement cases.

Mr. DINGELL. It tends to head off the circumstances that would make possible really effective conspiracy, doesn't it?

Mr. BROOKS. Well, it makes it a lot more difficult to have it by some mechanistic procedure, and you force them into the type of conversations and meetings which might be used as evidence of conspiracy. And I think that also in terms of reciprocity—while Stigler says that it is good to have reciprocity because it helps to break down a price conspiracy, because the secret price concession is done through the medium of reciprocity—I think that an argument can be made in the

other direction: that if a firm wants to make a price concession, and cannot do it through reciprocity, it is more likely to be caught by its competitors if it makes the concession, and it is less likely to get away with it.

Mr. DINGELL. Professor, I have one impression. And that is that there are a number of activities going on with regard to the Robinson-Patman Act, one of which is the possible militating toward a repeal. But I also get the impression that there is an attempt made here to repeal it by administrative action, to sort of nibble it to death administratively. Now, you are quite a student of this, and you have done considerable reading and study and work in this area. Are you able to tell us whether there is anything of the second kind around, in other words, do you observe that there is any attempt on the part of Government agencies, either Justice or the FTC, to negate the effectiveness of the Robinson-Patman Act by failure to enforce it, or is there an attempt being made to say that you can dissent in effect, either in the Bureau of the Budget or other executive agency to effectively negate the purposes of the Robinson-Patman through reducing enforcement?

Mr. BROOKS. Before I answer that, could I make one addition to my preceding statement, because I think it will make it more complete.

Mr. DINGELL. Certainly.

Mr. BROOKS. The reason that I think it is good to force a violation of an implicit conspiracy out into the open is that I feel that firms oftentimes do have great pressure to reduce prices. If they can reduce them in covert ways, then they can succeed in doing this without breaking up the basic conspiracy. But if they have to do it in the open, and the economic pressures are so great as to force them to openly violate the conspiracy, it might lead to the breaking up of the conspiracy.

Now, the Neal task force statement about sporadic price-cutting being a procedure by which conspiracy is broken up, I think, is also correct. But there is no basis in enforcement for anyone to feel that Robinson-Patman has prohibited a sporadic type of price concession that was leading to the breaking up of a conspiracy, because I simply don't think any cases have been brought in situations of that type. So it is just a pointless kind of fear.

But on this question of enforcement I think that we have to admit that if there aren't enough resources to enforce the law across the board, that you automatically have to select what you are going to concentrate your resources on.

And I think that some judgments can be made about the types of cases that would do the most good. Now, in many instances things that are complained about simply don't have much effect one way or another. And if you don't have resources to enforce all of the act across the board, I think you can't help but choose. Because you take certain things, that means you can't take others.

Now, I don't think there is any attempt to reduce the level of enforcement among the agencies. It seems to me that they simply have gotten tied up in some knots that are really not sufficient basis for all this controversy. And I do think that it is sort of a block or hangup that has caused the reduction in enforcement rather than any conscious attempt not to have enforcement. I guess there might be some problem of agreeing in which cases it should be enforced. I think they

bring cases—or somebody wants to bring a case, and somebody else feels that it really is not a very worthy case.

Mr. DINGELL. While you are on this point, Professor, would you address yourself to the question of whether there should be shifts in emphasis. Should there be more emphasis in a particular area, or less? And if so, in which areas of Robinson-Patman enforcement would you feel that there should be more emphasis on enforcement.

Mr. BROOKS. Well, as I stated in my statement, the secondary line cases should be concentrated on situations where there is a cumulative pattern, rather than just the sort of random kind of thing that you have in some markets—for example, the auto parts cases. Now, those seem to be sort of silly cases to me, because the entire auto parts business is a very good example of just a sort of helter-skelter marketing situation, and you even had items in the record where they would ask an auto parts dealer, "Do you know whether you were injured?" and he would say, "I wasn't injured," and they would say, "But how do you know you weren't injured?" and the guy simply couldn't grasp the question, because he had no idea whatsoever of how he could be injured by this kind of erratic, random pricing variation that you had in that market.

But I think where you have sellers treating large firms differently from small firms, and where you can't really show that there is any real difference in the incremental cost of serving the two groups of firms, I think this has a systematic effect and puts the small firms under a handicap that is not related to their efficiency, and this destroys the validity of the competitive process at the secondary level.

So I think that kind of distinction could be made.

And I also think that predatory pricing is something that does happen, and that if business firms found out that enforcement was being neglected in that areas, there would be a lot more of it than we have now.

One interesting thing is that a lot of the called-for "precision in standards" or guidelines for enforcement so that the businessman "can know what he can do and what he can't do," are really wanted so that the businessman will know that he can do some things he wants to do and not have to worry about the law being after him. And when you bring out a guideline or some kind of *per se* type rule, they will then plead for exceptions and say that this is a ridiculous rule in this particular case.

So that in effect they don't like it either way. They will complain in one case about silly rules that don't make sense, and in the other case a need for rules so that they will know what they can do and what they can't do.

And I think that if we are going to use expertise that we should use expertise to in effect decide about violations on the basis of the facts, and not because of rules that really don't fit all the situations that you might run up against.

Mr. DINGELL. Professor, I would like to thank you for a very helpful statement. The information that has been given to the committee is extremely important and helpful. I have read your prepared statement with a great deal of interest. And Mr. Potvin has indicated to me that he has a number of questions he would like to ask after he has had

an opportunity to analyze it a little more carefully. And if this is not offensive, we would like to do that.

Mr. BROOKS. That would be fine.

(The information follows:)

COMMENTS ON ADDITIONAL QUESTIONS

In view of the analysis of the *Utah Pie* case that I have presented, a serious doubt is cast on some of the Neal report recommendations, since that report itself stated that its proposed changes would *avoid* cases like *Utah Pie!* One of the main values of the availability of private enforcement of antitrust is that it makes possible the bringing of socially desirable litigation that would otherwise not be attempted because of limitations on public enforcement resources. Then too, those officials who make the decision on whether the government will bring a case may decide that the case has no public interest, but this may be based on a necessarily limited familiarity with the facts and the setting of the case. Those who feel injured, who know the facts of the case through their own experience—should at least have the right to have their case heard by a court, if they feel that their case is persuasive enough to warrant the use of their own resources for private litigation.

I feel that private suits which encourage competition, such as *Utah Pie*, are of much more public value than *direct* legal action against undesirable practices growing out of a *lack* of competition. The *mileage* is much greater with an approach of *indirect* promotion of consumer interest through the promotion of active competition. Informational advertising by truly *competitive* firms in this respect, and much advertising *is* of this type, would probably be a far more effective promoter of consumer interest than suits—public or private—against fraud, or public provision of information. To the extent that private, as well as public, resources are devoted to the indirect promotion of consumer interest through promotion of vigorous competition, the extra mileage provided by this more far-reaching approach to consumerism is further augmented. The resources of the business firms themselves are enlisted on the side of the consumer, not only in the competition itself, but also in the promotion of a more effective competition. "What is good for General Motors" is not always *bad* for the country, either, and true competition results in a harmony of business interests with consumer interests. The advantages of competition are so great as to even justify considerable inefficiency, if that is required to have it, but the degree of inefficiency actually involved—even in the limited number of cases where it exists at all—is usually far less than is believed, or claimed.

On the question of conglomerate mergers: while waiting for the results of careful research on their economic effects, I would not allow them to proceed, as Professor Stigler suggested, but I would *prohibit* them in the meantime. This is because a mistake may be made in *allowing* them as well as in *prohibiting* them, but it would be much more difficult to reverse the first kind of mistake than the second kind, should the results of careful studies call for reversal of policy toward conglomerate mergers. Besides, the very nature of conglomerates is such that the social economic cost of prohibiting this type merger is probably quite small, so there is much to gain, and little to lose, by such a policy, at least for the interim. Stigler's statement that government tax policy has encouraged conglomerates doesn't justify the conclusion that government shouldn't prohibit them. Legal prohibitions may exist independent of—even in spite of—the particular elements that may provide motivation to do that which is prohibited.

Mr. DINGELL. We would like to thank you for your appearance this morning and for the time and care you have put in preparation for it.

If there is no further business to come before the subcommittee at this time, we will adjourn, subject to the call of the Chair.

(Whereupon, at 12 noon, February 6, 1970, the subcommittee was adjourned, subject to the call of the Chair.)

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

THURSDAY, FEBRUARY 26, 1970

HOUSE OF REPRESENTATIVES, SPECIAL SUBCOMMITTEE ON
SMALL BUSINESS AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:45 a.m., in room 2359 Rayburn House Office Building, Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representatives Dingell, Smith, and Horton.

Also present: Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

This is a continuation of the hearings of the special subcommittee to investigate the impact of the Robinson-Patman Act and antitrust laws on small business.

Our first witness is Mr. Henry Bison, Jr., of Bison and Quinlan. That pronunciation is correct, isn't it?

Mr. BISON. That is correct, Mr. Chairman.

Mr. DINGELL. Welcome to the subcommittee, and you may give such statement as you wish to give.

And Mr. Potvin tells me you are accompanied by Mr. Watson Rogers.

Mr. Rogers, we are happy to have you.

Gentlemen, if you will give your full identification for purposes of the record, the Chair will recognize you for such statements as you choose to give.

Mr. BISON. My name is Henry Bison, Jr. I am an attorney at law, address 1317 F Street NW., Washington, D.C.

Mr. ROGERS. My name is Watson Rogers. I am president of the National Food Brokers Association, 1916 M Street NW., here in Washington.

Mr. DINGELL. Gentlemen, you may proceed.

TESTIMONY OF WATSON ROGERS, PRESIDENT, NATIONAL FOOD BROKERS ASSOCIATION, WASHINGTON, D.C.

Mr. ROGERS. Mr. Chairman, if we may, Mr. Bison and I have very short statements which we would like to present and then be available for any questions you may have.

Mr. DINGELL. That is entirely acceptable, gentlemen.

Mr. ROGERS. Thank you, sir.

Mr. Chairman and gentlemen of the committee, my name is Watson Rogers and I am president of the National Food Brokers Association

which has its headquarters here in Washington, D.C. Founded in 1904, our association now has 2,170 member firms. We have 17 member firms in Canada and 15 others located in England, Mexico, Norway, Puerto Rico, Sweden, and West Germany. Our U.S. members handle the majority of processed food sales of this Nation and cover all 50 States and the District of Columbia.

Food brokers are small businessmen who are local sales representatives for manufacturers and processors of food and other grocery store products. As marketing specialists they arrange for the sale and distribution of the products of these manufacturers and processors to all the wholesale buyers in their area, both chain and independent. On an average, one of our member firms sells for 23 manufacturers and sells to all the food outlets in his local area.

To the manufacturer the food broker is the sales authority on his own local market. The buyers depend on the food broker as a valuable and reliable source of supplies. Food brokers have been actively serving the economy of this country for well over a century—yet their growth in recent years has far overshadowed their great accomplishments of the past.

Food brokers today have achieved new sales successes and are on the threshold of even greater accomplishments. Describing the growth in the food industry's progress in the 1960's, *Grocery Manufacturer* magazine's survey showed the food brokers' sales jumped 105 percent compared to a growth in the grocery store sales of 64 percent and a 65 percent sales growth rate for grocery manufacturers.

Sales Management magazine reported on what it considered a revolution in selling to the grocery field, as follows:

Spawned of skyrocketing sales costs, a scarcity of selling talent, and sagging productivity, a revolution so quiet that it was barely noticed until recently is fast changing the sales and marketing techniques of the \$86 billion food and grocery market. Over the past 8 years alone, especially within the last five, more and more manufacturers of food and nonedible items sold through retail outlets are jettisoning their internal sales forces and turning their selling problems over to food brokers. Food brokerage, of course, is an ancient fixture of the retail market, and this in itself might tend to obscure the radical transformations taking place.

Now, we cite this to show that the vital position the food broker occupies, and the outstanding sales job he does, gives him a unique opportunity to observe the workers of the channels of food distribution. Perhaps better than any other element in the food industry, the food broker is in a position to observe the effects of fair and free competition compared to the effects of price discrimination and other unfair business practices.

Today as much as in the past the food broker sees the need for a strong and effective Robinson-Patman Act. Our grocery industry thrives on fair competition—vigorous—but fair. No other nation on earth—either in the past or today—has enjoyed the benefits of such an effective food distribution system. It is not a static system, but one which keeps developing new improvements and processes—ever spurred on by vigorous competition. We believe that part of the credit for the growth of the food industry and its resulting ability to provide so much value to the consumer is the Robinson-Patman Act.

This act made efficiency a factor for success rather than coercive buying power and price discriminations. What does our new economy

require in the way of enforcement of the Robinson-Patman Act? We believe it requires more vigorous and unceasing enforcement because the competitive pressures add to the incentive for some to try to obtain even a small price discrimination.

In the food industry, where profit margins are so low, even a small discrimination can make a tremendous difference. Thus, what some might consider a very minor discrimination could result in very harmful effects to the forces of competition in the food industry.

It is not our intention to review for the committee at length the history which made the Robinson-Patman Act necessary. We believe that the committee members and its staff are very familiar with it. We do urge, however, that in any analysis and consideration, the history be taken into account. With the present size of the industry, the discrimination and chaotic conditions that existed before the act was passed would be magnified many times.

People who were active in the food industry before 1936 can well attest to the serious threat to fair competition that existed. It is a well known fact that coercive, monopolistic buying power was exercised by certain buyers. Unfair price discriminations, such as false, unearned quantity discounts, phoney brokerage payments, secret rebates, allowances, and preferential treatment were rampant. Manufacturers, wholesalers, and retailers all were subject to discriminatory tactics. Threats and coercive measure were used to obtain concessions. There was great unrest on the part of small and independent business as well as many of the large concerns.

These situations were proved in investigations made by the Federal Trade Commission and by a special congressional committee.

Gentlemen, looking at the present status of the food industry, as well as the past history, we feel very emphatically that more than ever there is a strong need for an effective Robinson-Patman Act, properly enforced. Any effort to weaken the act or its enforcement would have a most harmful effect on competition in the food industry, and thus would hurt the American consumer.

I thank you very much, Mr. Chairman.

That completes my prepared statement. If you would like Mr. Bison to make his very brief statement now, then we would be available for questions.

Mr. DINGELL. The Chair wishes to commend you for a very fine, well thought out statement, and the Chair will now recognize Mr. Bison for his statement.

TESTIMONY OF HENRY BISON, JR., ATTORNEY, WASHINGTON, D.C.

Mr. BISON. Thank you, Mr. Chairman.

I am Henry Bison, Jr., a practicing attorney, and a partner in the law firm Bison & Quinlan, with offices in Washington, D.C.

The views I express are my own and based on over 20 years' experience representing individuals, firms, and organizations in the food industry. I am now, and have been for many years, general counsel of both the National Food Brokers Association and the National Association of Retail Grocers of the United States.

Throughout my professional career, I have consistently represented food industry groups regarded as supporters of the Robinson-Patman Act before Federal courts and the Federal Trade Commission.

My latest published article on the subject is entitled. "The 'Services Rendered' Provision in the Brokerage Section of the Robinson-Patman Act."

I wonder if you would like to have some portion of that inserted in the record here. I would, Mr. Chairman; I would be glad to confer with your counsel on that matter.

Mr. DINGELL. I think that would be entirely appropriate. If you would consult with counsel with regard to that, I am sure you and he can work out what you want to include in the record, Mr. Bison.

Mr. HORTON. Perhaps the whole article ought to be put in. I think it would be very helpful.

Mr. BISON. I would be very happy to do that. I appreciate the opportunity.

Mr. HORTON. Fine.

(The article follows:)

[Reprinted from *Notre Dame Lawyer*, February 1966]

THE "SERVICES RENDERED" PROVISION IN THE BROKERAGE SECTION OF THE ROBINSON-PATMAN ACT

*Henry J. Bison, Jr.**

No expression in the Robinson-Patman Act has received more attention than the "for services rendered" provision in section 2(c).¹ For many years it has been an important issue in a considerable amount of litigation. Various efforts have been made to interpret the "services rendered" terminology as a general exception in the brokerage section, which permits buyers and their agents to receive brokerage in one form or another on their purchases. These attempts have not met with success, and some have concluded that the "services rendered" provision has been read out of the act.²

Section 2(c) applies to a buyer who receives brokerage or other compensation in its place from a seller, or his intermediary, on the buyer's purchases. It also relates to the paying of such brokerage by a seller. The question presented is whether the words "except for services rendered in connection with the sale or purchase of goods, wares, or merchandise" permit a buyer to receive (and a seller to grant) brokerage or any allowance or discount in place of brokerage on his purchases. Does section 2(c) *absolutely* prohibit a buyer or his agent from receiving "anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof" from a seller or his agent on the buyer's purchases? Can a buyer render services to a seller in connection with the buyer's purchases to justify his receiving brokerage from a seller?

To fully understand section 2(c) one must consider the legislature's intent in enacting the Robinson-Patman Act. It has been stated that the basic purpose of the act is

to restore, so far as possible, equality of opportunity in business by strengthening antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants, and other businessmen.³

* Member, District of Columbia Bar, Maryland Bar; B.S., Miami University, 1941; M.A., Ohio State University, 1942; LL.B., Georgetown University Law School, 1946; General Counsel, National Association of Retail Grocers; partner, *Bison & Quinlan*, Washington, D.C. Mr. Bison is the author of "Economic Protective Power of States Under the Commerce Clause," which appeared in volume thirty-eight of the *Georgetown Law Journal*.

1 Section 2(c) provides:

[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof *except for services rendered in connection with the sale or purchase of goods, wares, or merchandise*, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid. (Emphasis added.)

49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

2 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188 (1955).

3 H.R. REP. No. 2287, 74th Cong., 2d Sess. 3 (1936).

The aim of section 2(c) is to prevent abuse of the brokerage function. Prior to enactment of the law it was the practice of certain buyers to demand the allowance of brokerage on their purchases.⁴ Sometimes this involved payments to fictitious brokers who turned them over to their employers. This was deemed to be only one method of abusing the brokerage function. Section 2(c) is phrased broadly to cover all means by which brokerage could be used to effect price discrimination.⁵

I. Appellate Decisional Law

Appellate adjudications directly on this issue have, for almost three decades, unanimously held that section 2(c) expresses an absolute prohibition against a buyer — either directly or through one acting as his agent — receiving brokerage, or other compensation in lieu thereof, from a seller on the buyer's own purchases.⁶ To interpret the "services rendered" provision as a general exception allowing buyers to receive brokerage was regarded as contrary to the purpose of the law. The Fourth Circuit contended:

If it were a sufficient basis to bring the allowance of brokerage commissions within the [for services rendered] exception of the section, every purchasing agent for a chain of stores might lawfully receive such commissions; for he does for the stores of his chain precisely what is done by Oliver [in this case acting as an agent for a group of buyers] for the subscribers to its service and benefits the sellers in making sales in precisely the same way. We have no doubt that it was just this sort of thing that it was the purpose of the act to prevent.⁷

In interpreting section 2(c), the courts have adopted various modes of reasoning. One basis is that buyers and their agents have an interest in conflict with sellers⁸ which prevents them from rendering services to sellers in such a manner as to justify buyers receiving brokerage on their own purchases.⁹ Thus, one court held that a buyer may not be compensated for services rendered by

⁴ *Id.* at 15.

⁵ *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960).

⁶ *Western Fruit Growers Sales Co. v. FTC*, 322 F.2d 67 (9th Cir. 1963), *cert. denied*, 376 U.S. 907 (1964); *Independent Grocers Alliance Distrib. Co. v. FTC*, 203 F.2d 941 (7th Cir. 1953); *Modern Marketing Servs., Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945); *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945); *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945); *Fitch v. Kentucky-Tennessee Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940); *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

⁷ *Oliver Bros. v. FTC*, 102 F.2d 763, 770 (4th Cir. 1939).

⁸ We may not be in as intimate touch with the ways of commerce as the Commission, but we would be naive indeed if we believed that buyers would have any great solicitude for the welfare of their commercial antagonists, sellers. The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule.

Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964).

⁹ The Report of the House Judiciary Committee explained the reasoning for this concept by pointing out that in a sales transaction

the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be ren-

his agents who, it was claimed, acted also as agents of the seller.¹⁰ The court said:

It is obvious that dual representation by agents opens a wide field for fraud and oppression. Conflicting interests are always engaged when an attempt is made by buyers and sellers to arrive at a market price for commodities. We entertain no doubt that it was the intention of Congress to prevent dual representation by agents purporting to deal on behalf of both buyer and seller. For this reason paragraph (c) is framed by disjunctives. The edge of the paragraph cuts two ways, prohibiting the payment or receipt of commissions, discounts or brokerage to the adversary party by the other's agent. The phrase "except for services rendered" is employed by Congress to indicate that if there be compensation to an agent it must be for bona fide brokerage, viz., for actual services rendered to his principal by the agent. The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.¹¹

The legislative history of the brokerage clause supports this view. Congressman Utterback, who was in charge of the legislation in the House of Representatives and submitted the House report on the bill for the Committee on the Judiciary stated:

The bill prohibits payment or allowance of brokerage or commission except for services rendered. As explained more fully in the report of the House Committee on the Judiciary, this refers to true brokerage services rendered in fact for the party who pays for them, whether he be an agent employed and paid by the seller to find market outlets or one employed and paid by the buyer to find sources of supply.¹²

Thus, the "services rendered" provision in section 2(c) was interpreted to qualify the prohibition therein so as to allow a seller or a buyer to pay brokerage to his agent for services he actually renders to his principal.

According to informed commentators this construction has been approved by the appellate courts.¹³ The courts have held that services rendered by buyers and their agents are in connection with their "own purchase, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself."¹⁴ Such benefits as sellers receive are either

dering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest.

H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936).

¹⁰ Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939).

¹¹ *Id.* at 674-75.

¹² 80 CONG. REC. 9418 (1936).

¹³ ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188, 192 (1955).

¹⁴ Southgate Brokerage Co. v. FTC, 150 F.2d 607, 610 (4th Cir. 1945). See Western Fruit Growers Sales Co. v. FTC, 322 F.2d 67 (9th Cir. 1963); Modern Marketing Servs., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939).

rendered as a gratuity,¹⁵ donated,¹⁶ or incidental to the purchase and sale.¹⁷

One thread that runs through appellate interpretations of the "services rendered" provision is the fundamental concern of Congress to prevent the diversion of brokerage — or benefits derived therefrom — to buyers who would be able, because of their purchasing power, to gain an advantage over competitors. Such diversion would force a higher disproportionate share of the sellers' selling costs, on buyers who were discriminated against, with sales to favored buyers bearing less than their appropriate share. The courts have construed the provision so as to effectuate the act's primary purpose of preventing this result.

Even where it may be conceded that buyers or their agents rendered a service to sellers, courts have construed the prohibition as preventing buyers receiving brokerage from a seller or a seller's agent. Commenting on the contention that "except for services rendered" reflects congressional recognition that a buyer or his agent may perform services for a seller in a sales transaction for which a seller may pay and a buyer may receive brokerage, one court observed:

The construction contended for makes much of its [brokerage section] language meaningless; it does violence to the purpose of the Act and has been explicitly rejected in other circuits. It is plain enough that the paragraph, [Section 2(c)] taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.¹⁸

In *Oliver Bros. v. FTC*, the Fourth Circuit said:

And even if it were true that Oliver rendered services to the sellers, we do not think that this would change the situation. No one would contend that, without violating this section, a broker representing the seller could give his commissions to the buyer; for in such case the action of the broker would be the action of his principal, the seller, and would amount to the allowance of commissions by the seller to the other party to the transaction in direct violation of the statutory provision. As we have seen, it constitutes a clear violation of the section for the buyer to receive commissions allowed an agent who represents him alone. If, therefore, the buyer may not receive commissions allowed either his own agent or the agent of the seller, it would seem to follow necessarily that he may not receive commissions allowed a broker who is the agent of both.¹⁹

Without a single contrary decision, the appellate courts have held that the exception in section 2(c) of payments "for services rendered" does not apply to services rendered by a buyer, or a buyer's representative, to a seller on the buyer's purchases.²⁰

15 *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 611 (4th Cir. 1945).

16 *Oliver Bros. v. FTC*, 102 F.2d 763, 766 (4th Cir. 1939).

17 *Modern Marketing Servs., Inc. v. FTC*, 149 F.2d 970, 978 (7th Cir. 1945).

18 *Quality Bakers of America v. FTC*, 114 F.2d 393, 398 (1st Cir. 1940).

19 102 F.2d 763, 770 (4th Cir. 1939).

20 One lower court has taken a contrary view. It held that jobbers who were also buyers rendered a brokerage service to the seller, *viz.*, bringing buyer and seller together, for which they

The dictum of the Supreme Court in the original *Broch* case dealing with the "services rendered" exception²¹ has been interpreted as authority for holding that a buyer might render brokerage services to a seller to justify receiving a brokerage payment or discount.²² However, the majority opinion emphasizes that section 2(c) covers all means by which brokerage could be used to effect price discrimination.²³ Moreover, in applying section 2(c) to direct as well as indirect allowances by a seller's broker to a buyer, the Court rejected a construction that would have removed one of the "absolute" bans of the section.²⁴ Thus, the use of the *Broch* case as authority for the doctrine that the "services rendered" exception allows buyers to receive brokerage on their purchases appears to be based on a strained construction. It was not a case where the buyer claimed or received any brokerage allowance or discount as compensation for services.

II. Identifying Cases Cognizable Under Section 2(c)

While appellate courts have consistently rejected attempts to construe the "services rendered" exception in section 2(c) as permitting the diversion of brokerage, or an allowance in lieu thereof, to buyers on their purchases, it is important to recognize that section 2(c) covers only anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof.²⁵ It does not apply to a payment which is not brokerage or to an allowance not given or received in the place of brokerage.

The primary question is not whether a buyer has rendered services—whatever they may be—to a seller, but whether the payment, allowance or discount amounted to a direct or indirect payment of brokerage by one party to the opposite party in a sale or purchase. The answer to this question is of crucial importance because buyers may receive payments or allowances from sellers, e.g., cooperative merchandising payments permitted under section 2(d),

can receive a commission from the seller. The court gave great weight to its finding that the jobber-buyers resell only at a price fixed by the seller. It developed the anomalous interpretation that the "for services rendered" exception applies to a buyer receiving brokerage on his purchases if the buyer resells the merchandise at a price fixed by the seller. The inevitable consequence of this theory is to promote price rigidity and uniformity. It raises a host of problems relating to resale price maintenance. *Empire Rayon Yarn Co. v. American Viscose Corp.*, 238 F. Supp. 556 (S.D.N.Y. 1965). See also *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

21 There is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.

FTC v. Henry Broch & Co., 363 U.S. 166, 173 (1960).

22 *Empire Rayon Yarn Co. v. American Viscose Corp.*, 238 F. Supp. 556 (S.D.N.Y. 1965).

23 *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960).

24 An interesting and frequently ignored aspect of the *Broch* case on the question of whether buyers may render services to sellers and receive brokerage allowances as compensation for such services is that the minority opinion by four members of the court expressed the view that under the statutory scheme in section 2(c), neither a buyer nor his intermediary can perform legitimate brokerage services for a seller to provide an exemption under the "services rendered" provision. *Id.* at 181 (dissenting opinion).

25 "Section 2(c) is narrowly drawn to condemn the practice of exchanging brokerage between buyer and seller, whether the exchange be an open payment or disguised as a discount or allowance." *Western Fruit Growers Sales Co. v. FTC*, 322 F.2d 67, 69 (9th Cir. 1963).

which do not involve, directly or indirectly, any payment of brokerage.²⁶ A discriminatory preference may not be cognizable at all under section 2(c). The question as to whether a competitive advantage was given a buyer through the payment of brokerage, or an allowance in lieu thereof, must be determined by examination of the facts and circumstances in each case. One cannot presume the nexus between a preferential payment and the diversion of brokerage. Indeed, there must be substantial evidence in the record to support any inference that concessions received by a buyer were in lieu of brokerage.²⁷ The mere fact that a buyer's strong purchasing power enabled him to buy at favorable prices will not warrant finding a violation of 2(c).²⁸ Every reduction in price, coupled with a reduction in brokerage, does not compel the conclusion that an allowance in lieu of brokerage has been granted.²⁹ However, a fact of this importance cannot be overlooked, and where a price reduction is offset by the amount of reduced brokerage the coincidence must be satisfactorily explained by the one charged with a brokerage violation.³⁰ Where a price reduction is tantamount to a discriminatory receipt of brokerage by a buyer, the absolute ban of 2(c) may apply.³¹

The law does not allow the circumvention of the brokerage section by subterfuges involving indirect discounts in lieu of brokerage. The mere fact that the documents recording the sale make no mention of brokerage or compensation in lieu thereof will not prevent a finding that such an allowance was given when the facts surrounding the transaction support this conclusion.³² The true character of the payment or allowance depends on all the facts involved, including the relationship of the parties, their customary business practices, deviations therefrom and their dealings with customers and suppliers. Self-serving notations on invoices stating the purpose of an allowance are not conclusive in this regard.³³

The *Thomasville Chair* case³⁴ is important to consider at this point. It involved the application of section 2(c) to a manufacturer which granted a lower price to approximately four percent of its purchasers and accorded its salesmen a fifty percent lower commission on sales to these purchasers. The Fifth Circuit held that the reduction in commissions accompanied by a reduction in price could not result in a violation of section 2(c) unless the price reduction was shown to be unjustified under section 2(a) on the basis of differences in the costs of sales, including the commission differential, resulting from differing methods or quantities in which the goods were sold or delivered. Thus, in the context of this case, the court read the cost defense of section 2(a) into section

26 "There is no necessity for calling something brokerage that is not." *Robinson v. Stanley Home Prods., Inc.*, 272 F.2d 601, 604 (1st Cir. 1959). The corollary to this is that there is no necessity for calling brokerage something that it is not. See *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960); *In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959).

27 *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963).

28 *Id.* at 414.

29 *FTC v. Henry Broch & Co.*, 363 U.S. 166, 175 (1960).

30 *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960).

31 *FTC v. Henry Broch & Co.*, 363 U.S. 166, 176 (1960).

32 *In re Whitney & Co.*, 273 F.2d 211, 214 (9th Cir. 1959).

33 *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960); *Flotill Prods., Inc.*, 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

34 *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962).

2(c). It did this notwithstanding a clear holding by the Supreme Court in the *Brock* case that: "Section 2(c) . . . is independent of § 2(a) and was enacted by Congress because § 2(a) was not considered adequate to deal with abuses of the brokerage function."³⁵ Furthermore, the majority opinion in the *Brock* case specifically disapproved fusing the provisions of 2(a), which permits the defense of cost justification, with those of 2(c), which does not.³⁶ Despite this, the court in the *Thomasville Chair* case found that on the facts of the case before it no violation of section 2(c) would result unless the price differences involved were not justified under the cost defense proviso in section 2(a).

This case is important because of the Federal Trade Commission's memorandum accompanying its dismissal of the complaint. The memorandum contained the following statement:

We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated Section 2(c), the complaint must be dismissed.³⁷

Although the Commission did not acquiesce in the opinion of the court, there is some basis for questioning the assertion that the court's decision was based on a requirement that there be "a causal relationship between the reduced brokerage and the reduced sales price." It appears more reasonable to conclude that the court was not concerned with what caused the reduced prices involved, but rather whether they were justified under the cost defense of section 2(a). It seems to have taken the position that, because section 2(a) permits price differentials based on savings in selling costs resulting from differing methods of distribution, a seller may be free to pass on to selected buyers, in the form of a price reduction, any differential between his ordinary brokerage expense and the brokerage expense which he pays on sales to such buyers. It was precisely this contention with respect to a seller's broker that the Supreme Court rejected in the *Brock* case.³⁸ Thus, although Congress intended that section 2(c) prohibit the transmission of brokerage to buyers, the court in *Thomasville* would allow the same thing to be accomplished under 2(a). This would deprive 2(c) of any substance. On this basis, the opinion in this case actually offers little constructive guidance in construing section 2(c). It certainly lacks any precedential authority.

³⁵ 363 U.S. 166, 171 (1960).

³⁶ *Id.* at 176.

³⁷ 3 TRADE REG. REP. ¶ 16624 (F.T.C. Oct. 22, 1963).

³⁸ 363 U.S. 166 (1960).

III. Federal Trade Commission Interpretations

The most recent and conclusive indication that the FTC does not interpret the "services rendered" provision as a general exception in section 2(c) permitting buyers to receive brokerage on their purchases is contained in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry, which were promulgated April 15, 1965.³⁹

Section 74.2 (a)(1), (b) and (c), entitled Prohibited Brokerage, provides as follows:

(a) (1) The foregoing provision [section 2(c)] prohibits, in connection with the sale of goods, the payment of a brokerage fee or the granting of an allowance or discount in lieu of a brokerage fee —

- (i) By the seller to the buyer; and
- (ii) By the buyer to the seller; and

(iii) By the seller or the buyer to an agent, representative or other intermediary who is working for or in behalf of the other party to the sales transaction, or is subject to such other party's direct or indirect control; and

(iv) By an agent of the seller to the other party to the sales transaction, either through paying such other party all or a portion of his fee or through accepting a reduced fee which results in a reduction in the price by the seller.

The provision of this paragraph (a) also prohibits the receipt of such a commission, brokerage fee, discount or allowance under the conditions prescribed.

(b) The paying or granting or receiving or accepting of any commission, brokerage fee, or allowance or discount in lieu thereof, such as is proscribed by paragraph (a) of this section is unlawful without regard to whether or not the practice —

- (1) Causes or is likely to cause competitive injury as described in paragraph (a) of § 74.1;
- (2) Was employed to meet any payment, allowance or discount furnished by a competitor.

(c) An intermediary is prohibited from receiving, in connection with the same sales transaction, a brokerage fee or allowance or discount in lieu thereof from both the seller and the buyer, and is also prohibited from receiving a brokerage fee or allowance or discount in lieu thereof from either the seller or buyer if he, the intermediary, is subject to the direct or indirect control of the other party to the sales transaction.⁴⁰

In addition, section 74.2 provides:

(e) A discount or allowance by an industry member is in lieu of brokerage if it is attributable to a reduction or elimination of brokerage fees in connection with the sales transaction involved.

(1) A discount or allowance granted by an industry member to some but not all customers would not under ordinary circumstances be considered in lieu of brokerage if —

39 30 Fed. Reg. 5331 (1965).

40 30 Fed. Reg. 5332 (1965).

- (i) The industry member granting same makes no sales through brokers to any of his customers, or
 - (ii) The industry member makes all of his sales through brokers at the same brokerage rate.
- (2) The actual basis for a discount or allowance at the time it was granted will indicate whether or not such was in lieu of brokerage.⁴¹

The Commission offers the following as examples of violations of section 2(c):

Example No. 1. A seller sells goods sometimes through brokers and sometimes on a direct basis, where no broker is involved. If on a direct sale the seller deducts an amount from the price which in fact constitutes an allowance or discount in lieu of brokerage, both the seller and the buyer have violated paragraph (a) of this section. It is of no consequence whether such payment or allowance is made directly by check, by deduction by the buyer from invoice price before remitting payment therefor, by deduction from the sales price by the seller, or otherwise.

In other transactions, however, the above-described buyer may function, not as a buyer, but as a bona fide broker for the same seller, negotiate for him a sale of goods to another party in accord with the seller's instructions and authorization and lawfully receive a brokerage fee for such service.

Example No. 2. In order to make a sale of a large quantity of products to a particular buyer who will not pay the seller's going price, the seller and his broker agree that the usual brokerage fee will be reduced and that the price to such buyer will be less than otherwise by an amount reflecting all or part of the brokerage reduction. The sale is made to such buyer at the reduced price. The seller, the broker and the buyer have violated paragraph (a) of this section.

Example No. 3. A broker is in fact the purchasing agent for a large buyer corporation and he is in all respects subject to such corporation's supervision and control. In connection with negotiation of purchases of goods and the handling thereof on behalf of the buyer corporation, the broker performs certain incidental services for the sellers involved and is paid brokerage fees by the sellers for such services. The payment of the brokerage fees by the sellers and the receipt and acceptance thereof by the broker are violations of paragraph (a) of this section. A broker may receive compensation for negotiating a valid and binding sales contract only from his principal for whom he has negotiated such contract.⁴²

It should be noted that the FTC and members of the industry affected by these rules gave them careful attention during the three-year conference proceedings. They were finally promulgated after the unusual proceeding of a public hearing held by the full Commission. Three members of the Commission favored their promulgation and found them consistent in all respects with the law. One member dissented, and one member did not take part in the Commission's action.

Without question, the Trade Practice Rules for the Fresh Fruit and Vegetable Industry represent the Commission's most detailed interpretation of section 2(c). They leave no doubt that 2(c) expresses an absolute prohibition

41 30 Fed. Reg. 5333 (1965).

42 *Ibid.*

against a buyer — either directly or through one acting as his agent — receiving brokerage or other compensation in lieu thereof from a seller on the buyer's own purchases.

However, following the promulgation of the Trade Practice Rules for the Fresh Fruit and Vegetable Industry, the Commission dissipated some of the clarity of its earlier construction of the "services rendered" provision as expressed in these rules. This came about in the *Garrett-Holmes* case.⁴³ The respondent was charged with receiving brokerage or discounts in lieu thereof from some of its suppliers in connection with its purchases of food products for its own account for resale. In adopting the hearing examiner's findings of fact that the respondent received brokerage or discounts in lieu thereof, the Commission issued a final order to cease and desist. However, with one member dissenting, the Commission stated in its final order:

Here, as in *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173 (1960), "There is no evidence that the buyer rendered any services to the seller[s] * * * nor that anything in its method of dealing justified its getting a discriminatory price" as "brokerage" or discounts in lieu thereof. On the basis of the findings of fact, the examiner was correct in concluding that the payments received by respondent violated Section 2(c) of the Clayton Act, as amended.⁴⁴

In view of its clear holding in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry that the "services rendered" provision does not provide a basis allowing a buyer to receive brokerage on its purchases, the appendage added to the Commission's final order in this case raises more questions than it answers. Notwithstanding this, the Commission has never directly ruled that a buyer may receive brokerage or compensation in lieu thereof on the basis that it rendered services to the seller.

The Commission's opinion in the *Hruby* case⁴⁵ is not an exception to this settled administrative practice. In this case, two members of the Commission, with one member dissenting and two not participating, found that the discounts, allegedly brokerage, received by the buyer-respondent were in fact not brokerage or in lieu of brokerage but functional discounts. The majority opinion stated: "We must conclude that the lower net prices received by Hruby are not the result of the receipt of brokerage or discounts in lieu thereof and are not unlawful under Section 2(c)."⁴⁶ In effect, therefore, the Commission held that the practice complained of in this case was not cognizable under section 2(c).

*Flotill Prods., Inc.*⁴⁷ involved so-called field brokers which the Commission found did not purchase for their own account. Because of this, the Commission held that the seller could lawfully pay brokerage commissions to the field brokers. It also held that Flotill paid an unlawful allowance in lieu of brokerage to a buyer even though this allowance was fictitiously labeled as a promotional allowance.

43 *Garrett-Holmes Co.*, 3 TRADE REG. REP. ¶ 17209 (F.T.C. Feb. 26, 1965).

44 *Id.* at 22280.

45 *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962).

46 *Id.* at 1449.

47 *Flotill Prods. Co.*, 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964).

IV. Summary

Appellate adjudications and FTC administrative interpretations demonstrate that the "services rendered" provision in section 2(c) provides no basis for carving out an exception which would permit a buyer to receive brokerage or a discount in lieu thereof from a seller on the buyer's purchases. The absolute ban in section 2(c) against such diversion of brokerage, either directly or in the form of a price reduction, has been accepted. Where it is shown that a buyer received brokerage from a seller, directly or indirectly, there is no controlling precedent for holding that the "services rendered" provision provides an exception to the 2(c) prohibition.

The most frequently expressed underlying reason for this rule is that construing the provision as a general exception permitting buyers to receive brokerage on their purchases would open the door to price discriminations which the Robinson-Patman Act, and 2(c) in particular, was designed to prevent. The congressional intent to eliminate preferential treatment of favored buyers through the medium of brokerage appears to be the primary reason why both the courts and the Commission have rejected the argument that "services rendered" provides an exception allowing buyers to receive brokerage on their purchases. This construction has prevailed for nearly thirty years since the brokerage section first became law. The apparent desire is to carry out expressed legislative policy and to conform to what has judicially and administratively been determined as the basic overall congressional purpose and design in enacting section 2(c).

The prospects for change in this policy are uncertain. Much will depend on the selectivity exercised by the FTC in initiating actions under the brokerage section. Filing cases under this section which would be disposed of more appropriately under section 2(a) may lead to interpretative changes which could make the application of section 2(c) less clear and less certain. Where a price discrimination does not involve brokerage, section 2(c) is inapplicable. The overall statutory scheme imposes the dual obligation of first deciding whether the preferential treatment has been effected by means of receipt of brokerage or an allowance or discount in lieu thereof and then, if so, applying the absolute ban as provided in the brokerage section.

Mr. BISON. Before preparing this statement, I reviewed the transcript of the hearings of the subcommittee held last October and read many of the prepared statements of witnesses who appeared on February 4 and 5 of this year. In addition, I have read the so-called Stigler report, the Neal report, and the ABA Commission report, all of which make reference to the Robinson-Patman Act.

You have heard from many witnesses and some authors on each of these reports, and also with respect to various views on the principles of the Robinson-Patman Act as presently provided.

Virtually every argument both pro and con on this issue has already been stated in these proceedings. I shall not repeat any of this testimony. Repetition would add nothing.

My intention is to make this statement as brief as possible conserving whatever time is available for questions and any discussion that may result.

Before concluding my direct testimony, I should like to comment briefly on the following six points:

1. Attacks on the Robinson-Patman Act have tended to degenerate into tedious repetitious assertions founded on unproven assumptions, value judgments, and personal predilections. The time has come to suspend further proliferation of opinions evaluating this law for an objective realistic program to test its usefulness in preserving and strengthening competitive conditions in various markets.

Before consideration is given to amending the law, some rational effort should be made to enforce it. Never very vigorous and subject to spasmodic changes in policy, enforcement action has declined substantially in recent years. Today, we can only speculate on the economic consequences under current marketing conditions following meaningful enforcement of the act because this goal has yet to be achieved.

The public interest would benefit if the Commission moved ahead with a carefully programmed enforcement test of the law to develop information on which a factual appraisal can be made.

2. What is definitely needed, even desperately needed, is empirical evidence on the operation of the law and its economic effects under prevailing market conditions. We already have an overabundance of opinions on these questions. At this point, it would be a great relief if interested parties would disregard untested theories and hypotheses for a practical and objective examination of actual experience.

Then, perhaps, Congress could begin to perceive what is the best course in the public interest. If changes are needed in the law to preserve competitive conditions, an objective appraisal is needed. This is not possible unless economic analysis based on experience and observed facts has priority over deductive and presumptive reasoning.

3. Whatever study or action is undertaken by the Commission to examine this law further, scrupulous efforts should be made to preserve its complete objectivity at every stage. Supporters of the law in the business community have long contended that in previous studies of the statute, they were never afforded an opportunity to be heard. This complaint goes back to the Attorney General's committee to study the antitrust laws in 1955 and extends up to the more recent Stigler and Neal reports. An impartial and objective operation is essential if the results of the study are to be respected.

Mr. POTVIN. Mr. Chairman—

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. If I might intervene just briefly without disturbing your train of thought, I noted that you mentioned the Stigler and Neal task forces. You did not mention the ABA task force. Now, we learned in analyzing the membership of that committee that shockingly there was no well-known practitioner or member of the academic community who could be counted as a supporter of the act while those that are well known for vociferous qualities of their opposition of the act were legion. Do you not feel that you might have equally extended your remark to the ABA report?

Mr. BISON. Well, Mr. Potvin, I think I should have extended this remark to the ABA report. I would accept your suggestion, however, that this report should be added to those where business people in support of the act were not given an opportunity to be heard.

I think this is something we ought to be concerned with, that people who are supporting the law and who think it is valuable are never given the opportunity to present their views. If it was not for your committee, your subcommittee and your full committee, they would never be heard.

Mr. DINGELL. It rather appears to the Chair that if a court case were to be conducted under this particular set of rules it is almost certain that if the Supreme Court or Court of Appeals were to have an opportunity to review the matter it would be cast out for being totally unobjective and completely unfair, biased and not in conformity with the constitutional rights of people appearing in opposition. I think it is a violation of elementary due process. I always give the opposite or other side or opposing side a chance to be heard. And it makes me wonder if their arguments are so strong, why are they so reluctant to hear the opposing side. It is not even like the trial in "Alice in Wonderland" where first they gave them a fair trial and then they cut off their heads.

Mr. BISON. I certainly think your subcommittee here has performed a remarkable service because otherwise this would not be in the public record.

4. The subcommittee has performed a useful service in opening up opportunities for all to be heard on this important subject. Only through the good offices of the members and staff of this subcommittee has the voice of small business and other supporters of the law been heard.

5. A few members of the legal and teaching professions have been vociferous critics of the law. Their conclusions have been repeatedly expressed and given wide attention. It is significant that attacks on the Robinson-Patman Act have not come from any business groups whose members have first-hand experience of primary importance in judging the need and value of the law.

6. The subcommittee should be on the watch for attempts by the Federal Trade Commission to charge the law without congressional approval by narrowing the scope of the act through enforcement policy.

Some critics of the act oppose its per se provisions, sections 2(c), 2(d), 2(e), and have suggested—or implied—that these prohibitions in the statute not be enforced by the Commission. Congress should

never allow any agency to pick and choose what parts of a law it will enforce.

That concludes the direct remarks that we have.

Mr. DINGELL. Mr. Bison, the committee is grateful to you for your very, very helpful statement.

The Chair is happy to recognize our good friend, Mr. Horton, for some statements and comments as he chooses to make.

Mr. HORTON. Mr. Chairman, I thank you for giving me this opportunity to comment. First I want to thank both of these gentlemen, Mr. Rogers and Mr. Bison. But in particular, Mr. Bison, I want to commend you. I like succinct, concise, short statements and I think you have summed up a very controversial problem in a very precise manner. It is really a joy to read and to hear the type of statement that you have just made.

I think you have summed it up very carefully. I do not think we could report it any better than the way you have done it right here in your statement. I do commend you for the thought that has had to have gone into your statement and the great amount of work I am sure you have done in your field. We are appreciative of this information and of the manner in which you have presented it to us today.

Mr. BISON. Thank you, Mr. Horton.

Mr. DINGELL. Mr. Potvin?

Mr. POTVIN. Mr. Chairman.

Mr. Rogers, from your experience in the food industry, what effect do price discriminations have on prices paid by the consumer?

Mr. ROGERS. Would you repeat that, Mr. Counsel?

Mr. POTVIN. Yes, sir. Now, from your rather broad experience at both the State and the national level of trade association work, both the wholesale and the broker sectors of the industry, what effects do price discriminations have on the retail prices actually paid by the ultimate consumer of food products?

Mr. ROGERS. I base this on some of the statements that have been made before your committee saying that price discriminations were good, that they help the consumer. Is that what—

Mr. POTVIN. Yes, sir. To put this in context, I am not attempting to suggest, of course, what your answer should be but so that we may have the entire question—the assertion has been made repeatedly before this body that secret, sporadic price discriminations are helpful by and large to consumers in that they tend, over time, to be passed on to the consumer and that the net result is a saving to the consumer, and that if you do not allow price discriminations you are making consumers pay higher prices?

Mr. ROGERS. Well, we do not agree with that policy for this reason. In the first place, we have got to have a strong food industry and strong competitive conditions. We feel discriminations have a tendency to destroy competition. With the profit margins so small in the food industry today, I am wondering if I got a big price discrimination, would I really pass it on to the consumers? I do not think I would unless I knew all of my competitors were getting that same price under the provisions of the Robinson-Patman Act.

I think the one thing that helped a consumer is a strong Robinson-Patman Act. I know if I get a good price, and my competitors are

going to get it also. I have got to price my merchandise accordingly. I have got to price it down.

If I am a big coercive buyer and get a piece discrimination knowing it is not available to my competitors, why should I cut my price down low, when I am in a profit squeeze like most everyone faces today.

Mr. POTVIN. It is interesting that you should put it that way, sir. In discussing that matter with some of the officials of the trade on associations who work with food chains, one often hears the remark that we really do not care if we twist every last cent out of the price when we start working on the suppliers, but what we insist on is that no one gets a better price than we do.

Mr. ROGERS. That is right.

Mr. POTVIN. This suggests the correctness of your position. I should think.

Mr. ROGERS. Yes, sir.

Mr. POTVIN. Well, sir, as you know, the allegation has also been made that section 2(c) of the Robinson-Patman Act provides protection for food brokers, it sort of perpetuates you and protects you and insulates you and gives you a very special status, in addition to guaranteeing your commission. Do you have an answer, sir, to this allegation?

Mr. ROGERS. Over the years critics of the Robinson-Patman Act single out the brokerage section. I suppose they feel they cannot say we favor price discriminations, we want destructive price discriminations. That would not be very popular. Unfortunately, a lot of them do not know how we operate. I cannot believe they do not know more than some of the things they say would indicate. However, I will say this. It must be remembered that no manufacturer and no processor has to use food brokers. There is only one reason we are in the picture. We have to do the job better and we have to do it for less money than the manufacturer can do it for himself. If a manufacturer can sell the merchandise, do a better job than we do, then we lose the business. Furthermore, a manufacturer can use us in some markets, he can use his own salaried salesmen in other markets. The main benefit is that it prevents price discrimination among competing buyers. And years ago I recall the U.S. Wholesale Grocers Association took complete credit for getting 2(c) in the Robinson-Patman Act because they said it was absolutely essential to protect their members.

Mr. POTVIN. Let me ask this. Frequently the success of a given class of small businessmen who are somewhere in the middle of the distributive chain can be measured in at least a gross kind of way by trends, that is, to say if your share of the market is increasing, this suggests that you are indeed doing a better job than the manufacturer can do for himself. Can you tell us what the present situation is with food brokers? Have you been losing lines or gaining lines?

Mr. ROGERS. Well, we are having substantial growth. The reason—we have today the top marketing people in the food industry in our organization among our members. We can do the job for less, and we can do it better than they can do it for themselves. I referred to Grocery magazine survey, Grocery Manufacturer magazine, where they estimated during the 10 years in the sixties our volume increased

105 percent. This was compared to 64 percent for the retailers, 65 percent for the grocery manufacturers.

Now, there was a time years ago when people thought of brokers as just representing the smaller manufacturers who could not afford their own salaried sales organization. But that is not true any more. I guess it is all right to mention that one firm last year, Libby, McNeill & Libby—a very fine company—had a 500-man salaried sales organization. They dispensed with that 500-man sales organization and about 65 of our offices now are handling the total sales nationally for Libby.

Most of the large firms today, regardless of how large they are, use brokers for some of their lines.

Mr. POTVIN. During the course of these proceedings, sir, there has also been testimony that section 2(c) has prevented small business firms from, so to speak, getting together in order to have their own brokerage house, the group buying type of thing, that as a result of 2(c) they have not been able to get the benefit of these brokerage payments. Do you feel this is a valid criticism, and if not, why not?

Mr. ROGERS. Well, if you go back into history, you will recall one of the main things that brought about the passage of the Robinson-Patman Act was that one of the largest chains in the United States had their own brokerage house. This was again creating an unfair price discrimination.

I do not see how you could permit any small group to have their own brokerage house if you do not allow the same for A & P, Safeway, and all other customers. You have got to treat all fairly. All the small people want is an even break. I do not know of any of them asking for an advantage. But you cannot give one group an advantage and deny it to others.

Mr. POTVIN. Well, this is the problem the small business committee faces, of course, in acknowledging the rather two-edge sword quality of the antitrust laws.

Mr. ROGERS. I think this, that with this law vigorously enforced so the small have the equal break with the larger customers, is all they are asking for.

Mr. POTVIN. Mr. Bison, as general counsel for a trade association that consists, as I understand it, almost exclusively of small business concerns, and specifically small grocery retailers, what would your answer, sir, be to the oft-made charge that the Robinson-Patman Act promotes "soft competition" protecting individual competitors instead of advancing the vigor of competition.

Mr. BISON. Well, my comment would be along two lines, Mr. Potvin. First of all, competition is made up of competitors, and you cannot separate the vigor of competition from the number of competitors and their strength in a market. So when critics separate the theory from the practice, I think they get into serious trouble. You cannot preserve the substance of competition, the vigor of competition, without concern about individual competitors, their number, their health, and their vitality.

The policy of the statute, which Congress decided, deals with incipency, not a monopoly position of monopoly power after it has been created, but the tendency toward monopoly. This requires us to be concerned about competition in the terms of competitors. And I

think that the critics of the act have used this verbal formula of soft competition and hard competition, with very little meaning.

Mr. POTVIN. Don't you feel that it is rather convenient shorthand actually used by critics upon occasion to rather obfuscate the fact that if you do not have some concern for competitors you are really dooming in many industries a very substantial part of the small business population to early extinction.

Mr. BISON. That is a very important point, Mr. Potvin. In the proposed revision of the act which is in the Neal report, it was made clear that where a major competitor was injured in a market, then the act should be applied. But where a small business was injured as a result of discrimination, the act should not be applied. So really, I think if we adopt the model the Neal report follows in amending the act, I think if we apply the soft-hard competition dialog that is used so often, we find in practical application that the act protects only large business, the strong competitors in the market.

Mr. DINGELL. Are you saying, Mr. Bison, that the concept of concerning oneself with competition as opposed to competitors sets up a formula that only brings into play the sanctions of the act where a major competitor is hurt or where a very large number of small competitors are hurt as opposed to protecting small competitors and to establishing fair modes of competition. Is that what you are saying?

Mr. BISON. Yes, I am. I think that in order to preserve competition and protect the vigor of competition against the tendency toward monopoly, you have to be concerned about individual competitors in a market to be sure that that competition is vigorous and healthy. You cannot allow competition to be eaten away gradually and not be concerned until finally the day comes a oligopoly or monopoly exists.

There can be no doubt about the policy of the statute. And the arguments that critics are making is against the policy. Well, that is all right. But the concern we have is that sometimes they want changes to be made in the law without resort to proper processes of government, especially having the Congress approve what is being done.

Mr. DINGELL. What you are saying is that there is a move afoot to change the law by administrative practices rather than by statutory action in the Congress.

Mr. BISON. Exactly, and this I think is something we should be concerned about, regardless of which side of the fence one is on. We should preserve an orderly representative system of government we now have.

Mr. DINGELL. Mr. Potvin?

Mr. POTVIN. Thank you, Mr. Chairman.

Mr. Bison, one of the most emotionally rewarding experiences of these hearings has been the fact that so frequently opponents of the Robinson-Patman Act have based their opposition at least in part on the assertion that they feel that the Robinson-Patman Act alas is hurting small business and that they are worried about that. That is one of the reasons they say they would either like to dampen or perhaps eradicate it entirely. Do you have any comment on that?

Mr. BISON. Well, my first comment on that is that those of us who represent small business and who are charged with their welfare are not taking that position.

Mr. POTVIN. May I infer from that, sir, that it would be your judgment that support for the act from within the food and grocery industry, particularly the small business sector, is—how would you characterize it?

Mr. BISON. Support from that sector is very strong for the law. So the experience of those who are in business and who know the problems in the market every day is contrary to the assertion that the act has hurt small business.

Mr. POTVIN. Do you feel we are talking about wolves expressing concern about "them there shepherds being mean to those sheep," sort of?

Mr. BISON. Precisely.

Mr. POTVIN. Now, one of the other charges I would like you to discuss, if you would, sir, is that the Robinson-Patman Act in some manner deprives consumers of the benefits of the efficient distributive methods by somehow shielding distributors against the competitive inroads of larger firms?

Mr. BISON. Well, Mr. Potvin, the evidence of what is happening in the marketplace today, especially in food distribution, is absolutely contrary to that assertion. The claim has been made that the act protects small business to the point where large business is handicapped and that the inroads of large business in markets have been stifled. I would challenge anyone to produce one scintilla of empirical evidence to support that. All one has to do is look around and see the marketplace changes taking place. The evidence speaks so loud, so overwhelmingly, that this conclusion has no basis whatsoever.

Mr. POTVIN. Empirically in the real world, of course, we are faced with an economy that has become rapidly more and more concentrated.

Mr. BISON. The record will show it. Information from the various census figures shows that clearly.

Mr. POTVIN. And finally, sir, would you care to make a comment on the rather chilling observation that some critics have made that no great harm would be done even if discrimination were to drive small operators out of business because after all the entrepreneurs are not substantial and one supposes that new owners would quickly arise to take the place of those who have been forced out?

Mr. BISON. Here again, the evidence, the facts, the experience in the marketplace are completely contrary to the assumption that is implicit in that statement. In connection now with food distribution, the cost of land has been increasing tremendously, the cost of building has been going up considerably. There are problems of entries into shopping centers where an operator does not have a triple A No. 1 credit rating and cannot secure a lease.

Now, all of this evidence is in the record. The Small Business Committee of the House has looked into this problem many times. The facts are that it is more difficult today than ever before for new entries.

Mr. POTVIN. Would it be not quite probably correct to note that with the present state of the money market, quite apart from the characteristics of a given industry, the odds against making it as a new entrant are higher than they have probably been in our lifetime I would suppose.

Mr. BISON. I would say that statement is completely correct. One thing we all ought to be concerned with, Mr. Potvin, is the desire of young people to enter business, sons of owners to enter the business.

The owners of small business today are having a great difficulty in bringing young people into their business.

Mr. POTVIN. In closing, let me see if I can get you to discuss the personal aspects of this. It seems to me that there is something dehumanizing about simply treating small businessmen as digits or cogs in a machine. From that point of view, of course, a cog can be replaced. You have a whole parts bin full of them. But should not the small individual businessman just as any other, be he a worker or banker or anyone else, have certain individual human rights to receive fair treatment, equitable treatment and the rest?

Mr. BISON. I know the comment has been made in previous sessions of these hearings that social legislation should not be part of an antitrust law. Antitrust is social legislation. The people have a certain idea of what kind of a system they want, and that is why we have antitrust law. Also there is concern about human rights, human economic rights, and preventing a system where there is very little competition. If we are going to have more monopoly power, we face very severe problems in protecting consumers.

Mr. POTVIN. I have no further questions.

Mr. DINGELL. Mr. Oden?

Mr. ODEN. Mr. Bison, during the course of these hearings much has been said by various witnesses concerning the priorities and allocation of resources of the Federal Trade Commission, and their enforcement of the Robinson-Patman Act along with other antitrust laws. In your statement you state that before consideration is given to amending the law some rational effort should be made to enforce it.

I wonder if you could comment briefly on how you as a private practitioner see the Commission as far as its role in allocating its resources, picking the cases it is going to try, and what effect that has on economy and on competition?

Mr. BISON. My suggestion would be, Mr. Oden, that an individual or group of individuals be selected to program the activities of the Commission from the point of view of their importance to the economy in general. I would recommend that a group be set up to deal with the food industry. Everybody recognizes that this industry is vitally important to the welfare of the country. Somebody, well acquainted with what is going on, should report on and indicate where action is needed.

Other segments of the Commission's staff should be concerned with other industries. But I do think there has to be a rational effort to apply the law where it is needed.

Mr. ODEN. This seems to be a reoccurring criticism of the Federal Trade Commission, their reliance on the mail bag rather than any concerted effort to look into an industry to see what problems they are having and aim their resources toward solving problems after they have outlined them and delineated them.

Mr. BISON. I do not know that the so-called mail bag charge is completely correct. I am not privy to such information. But one of the problems the Commission has is the lack of resources. I know that the chairman has been concerned about this.

There has been imposed on the Commission a great many new and additional responsibilities, credit and labeling laws and so on. The increase in resources made available has not kept pace. We have to look

very closely to see the Commission has adequate staff, personnel, and all the other requirements needed for an effective enforcement program.

One of the great problems the Commissioner has is that appropriation levels are so uncertain from year to year. I would urge that something be done so that it can program more than 1 year ahead. I know business would have a very difficult time, if it could not see more than 1 year ahead.

Mr. DINGELL. Well, Mr. Bison, you have hit on a point that concerns me a great deal, and that is this problem we have with the Bureau of the Budget and allocation of priorities. It has been my position for some while that the Congress does not really have the information to know whether or not these regulatory agencies are doing the job that the Congress wants. We never get an understanding of what their real wishes or concerns or needs are. We have no way of establishing whether or not the priorities that Congress has established with regard to carrying out of the law and enforcement is actually being done in the fashion the Congress wants, or whether the agency even thinks it is able to do the job. The only thing we get is this rather vaguely defined report from them as to what their needs are all carefully muffed and filtered by the Bureau of the Budget. I wonder if you have some comments you would like to make on that?

Mr. BISON. It has been said that the agency is an independent agency and it has also been said that it is an arm of Congress. I wonder with control from the Budget Bureau whether it really is an arm of Congress. If the agency is not permitted to tell you how much money is needed, then its ability to serve the purpose for which it was created may be seriously impaired. I would urge the committee and the sub-committee to look into this matter and see what could be done so that the agency would be given the opportunity to express its views independent of what the Budget Bureau has imposed.

It seems to me that that is one thing that is necessary if the agency is to fulfill its purpose. If it is not permitted to express its views, it cannot fulfill its function in connection with the Robinson-Patman Act. We think all sides should be heard on the budget matter.

Mr. DINGELL. Of course, it does appear plain, I think, that the level of budgetary support being afforded the Federal Trade Commission to carry out the many and varied responsibilities has not been adequate.

Mr. BISON. It has not been.

Mr. DINGELL. This is of great concern to the Chair.

Mr. Bison and Mr. Rogers, the committee is grateful to you. You have given us very helpful testimony and we are most appreciative of the time and effort that went into it. We thank you very much.

Mr. BISON. Thank you, very much, Mr. Chairman.

Mr. DINGELL. Our next witnesses are Mr. H. Robert Field, attorney, Division of Compliance, Federal Trade Commission, and Mr. Henry M. Banta, attorney, Division of Compliance, Federal Trade Commission.

Gentlemen, we are happy to welcome you to the committee for such statements as you choose to give. And I hope that you will be at ease in your discussion with the committee. We hope that you will be comfortable during your time here.

Mr. POTVIN. Mr. Chairman,

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Initially I would like to offer, if I may, for the record, at this time, a paper prepared by these two gentlemen—off the record. (Discussion off the record.)

Mr. DINGELL. Without objection, the document will appear at this point in the record.

Mr. POTVIN. An evaluation of the effects of the orders issued under the Robinson-Patman Act, together with a memorandum from then Commissioner James M. Nicholson to his colleagues on the Commission circulating that paper.

Mr. DINGELL. Without objection, the documents referred to will appear in the record at this point.

(The material referred to follows:)

AN EVALUATION OF THE EFFECTS OF THE ORDERS ISSUED UNDER THE ROBINSON-PATMAN ACT

(By H. Robert Field and Henry M. Banta, Attorneys, Compliance Division,
Bureau of Restraint of Trade)

INTRODUCTION AND SUMMARY OF CONCLUSIONS

It is our purpose here to make some beginning toward an effort to evaluate the effect of some one thousand Robinson-Patman Act orders issued by the Commission over the past thirty-three (33) years. At the outset however we feel it important to affirm our commitment to the basic purpose of this as of our other antitrust statutes. We believe monopoly to be an unmitigated social, political and economic evil and consider its prevention and elimination to be required by any decent concept of a just society. But commitment to the principles is not necessarily commitment to all that is done in its name: great principles, honored with lip service and supported with ineffective measures, breed a singularly destructive cynicism. It is not the justness of the fight we are about to consider, but the choice of weapons.

We conclude: (1) That there is no satisfactory evidence that price discrimination is significantly related to the general phenomena of concentration in American industries; (2) that there is no persuasive evidence that the Commission's enforcement of the Robinson-Patman Price Discrimination Act has had any significant effect on either the structure, conduct or performance of any important American industry; (3) that, given the severe budget limitations faced by the Commission and the very high yields associated with enforcement in such other areas as mergers, price fixing, and deconcentration proceedings, it would probably be unproductive to attempt a rational defense of the Commission's present commitment of perhaps as much as 50% of its total antitrust resources to price discrimination work (including that done in the Division of General Trade Restraints); and (4) that price discrimination, being a creature of monopoly power, should be treated as such and subjected, in the appropriate case, to the traditional remedy of dissolution and divestiture.

SCOPE OF STUDY

In the first part of this paper we attempt to set out a reasonably comprehensive theory of price discrimination, none of which of course purports to be original. It is, rather, nothing more than a restatement of conventional price theory and the findings of established scholars in the field.¹ Its undertaking was necessary, however, because we were unable to find any single work which treated the problem of price discrimination in all of its several aspects. The conclusion of this section attempts to draw from this theoretical framework principles which,

¹ In case it should be thought that this has prejudiced our conclusions, we have consistently relied on economists who have established reputations as antitrusters in the classic sense and have scrupulously avoided reliance on those whose hostility to the competitive ideal might render their work suspect. In short, we believe what is reflected here is the judgment of the friends of antitrust, not its enemies.

when checked against all of the empirical data available, will provide a fairly sound basis for evaluating the Act's enforcement.²

The second part of this paper examines the actual pattern of the Act's enforcement: how each subsection has been used, and in which industries enforcement resources have been concentrated.

Part three discusses some of the legal and administrative problems arising in the post-order phase of enforcement.

In our final section we set out our conclusions.

Through this paper we shall deal only with the effect of orders actually issued by the Commission. We do not have, nor do we believe any one else has, the information necessary to measure how business conduct has been affected by the mere *existence* of the statute.³ Nor can we assess the impact of the various decisions, orders, and investigations on those who were not actually placed under order.

Additionally we have made no attempt to evaluate the case selection process. We have not considered whether the cases resulting in orders having represented an optimum allocation of enforcement resources.

Before we begin we wish to make quite clear that our basic approach is wholly "structural" in orientation. We are not concerned with the ethics or morality of price discrimination. And even less are we concerned with the goodness or badness of the businessmen who engage in it. We are interested solely in the structural causes of discriminatory conduct and the structural effects. Robert L. Heilbroner has rather succinctly summed up this point:

"Monopoly (and nowadays oligopoly) are bad words to most people, just as competition is a good word. But with the one as with the other, not everyone can specify exactly what is bad about them. Often we get the impression that the aims of the monopolist are evil and grasping, while those of the competitor are wholesome and altruistic, and therefore the essential difference between a world of pure competition and one of very impure competition is one of motives and drives—of well-meaning competitors and ill-intentioned monopolists."

"The truth is that *exactly the same motives drive the monopoly and the competitive firm*. Both seek to maximize their profits. Indeed, the competitive firm, placed in a situation in which it must keep careful track of costs and revenues in order to survive is apt to be, if anything, more penny-pinching and more intensely profit-oriented than the monopolist who (as we shall see) can afford to take a less hungry attitude toward profits. The lesson to be learned—and it is an important one—is that motives have nothing to do with the problem of less-than-pure competition. *The difference between a monopoly, and oligopoly, and a situation of pure competition is entirely one of market structure—that is, of the number of firms, ease of entry or exit, and the degree of differentiation among their goods.*"⁴ (Emphasis in original.)

² If there is any doubt that such a technical analysis is necessary, we suggest that certain observations of Professor Jay W. Forrester of The Massachusetts Institute of Technology are highly pertinent here. Professor Forrester notes that the problems of all "complex systems" (and certainly the price system is complex by any definition), are quite beyond solutions suggested by simply "common sense." His language is unfortunately that of the mathematician and systems analyst, but his point is quite clear:

"From all normal personal experience one learns that cause and effect are closely related in time and space. A difficulty or failure of the simple system is observed at once. This cause is obvious and immediately precedes the consequence. But in complex systems [e.g., economic processes] all of these facts become fallacies. Cause and effect are not closely related either in time or in space. Causes of a symptom may actually lie in some far distant sector of a social system. Furthermore, symptoms may appear long after the primary causes."

"But the complex system is far more devious and diabolical than merely being different from the simple systems with which we have experience. Although it is truly different, it appears to be the same. The complex system presents an apparent cause that is close in time and space to the observed symptoms. But the relationship is usually not one of cause and effect. Instead both are coincident symptoms arising from the dynamics of the system structure. Almost all variables in a complex system are highly correlated, but time correlation means little in distinguishing cause from effect. Much statistical and correlation analysis is futilely pursuing this will-o'-the-wisp."

"In a situation where coincident symptoms appear to be causes, a person acts to dispel the symptoms. But the underlying causes remain. The treatment is either ineffective or actually detrimental. With a high degree of confidence we can say that the intuitive solutions to the problems of complex social systems will be wrong most of the time. Here lies much of the explanation for the problems of faltering companies, disappointments in developing nations, foreign-exchange crises, and troubles of urban areas." *Urban Dynamics* (1969), pp. 107, 1109-110 (emphasis added).

³ Packer, *State of Research in Antitrust Law* (1963), pp. 118-119.

⁴ Heilbroner, *Understanding Microeconomics* (1968), p. 107.

Part I. Criteria for Evaluation

The basic question, one that must of course precede any evaluation of Robinson-Patman Act enforcement, is what kind of price discrimination injures competition. For purposes of this discussion, we define injury to competition to mean *any effect which makes the structure of the market less competitive in character*, i.e., that either (1) raises the concentration ratio, (2) raises the barrier to entry, or (3) increases the degree of product differentiation.⁵ Needless to say, in this section we will only be referring to economic price discrimination.⁶

A. Types of Price Discrimination

All price discrimination can be classified into one of three types; profit maximizing, promotional, and collusive.

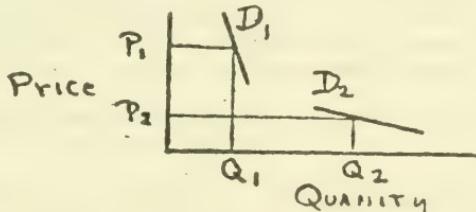
Profit maximizing price discrimination is used by a seller to maximize his profit within the framework of the existing demand for his product. Essentially, the seller divides his market into two or more submarkets, each with different demand curves.⁷ The revenue resulting from charging different profit maximizing prices in each of two submarkets is greater than the revenue that would have been realized from charging a single profit maximizing price in both of them.⁸

⁵ Bain, *Industrial Organization* (1959), pp. 7-9.

⁶ "[Economic] price discrimination occurs whenever goods are sold at prices which differ from each other by more than long-run average costs." (Kaysen and Turner, *Antitrust Policy* (1959), p. 179). We do not consider the kind of economic discrimination that results when the seller has lower costs in supplying one customer than another, yet charges both the same price.

⁷ Those who are familiar with Pigou's classification of price discrimination will recognize that our profit maximizing discrimination closely approximates his "third degree" discrimination. A. C. Pigou, *The Economics of Welfare* (1920) Chap. XVII. The difference is that third degree discrimination requires the seller to have a monopoly. (We have not discussed first or second degree discrimination primarily because there seems some question as to whether they exist in reality. See Whittaker *Price Discrimination Theory: A Correction Antitrust Law & Economics Rev.* 145 (1968). And it is extremely unlikely that any such thing could come within the range of the Robinson-Patman Act.)

⁸ This can be illustrated graphically:



Here our supplier has divided his customers into two submarkets, each having a different demand curve (represented as D₁ and D₂). Each curve has a different "elasticity," i.e., the percentage reduction in volume of sales that would be induced by a one-percent increase in price. It is generally expressed as:

$$e = \frac{\text{percentage change in quantity demanded}}{\text{percentage change in price}}$$

or

$$e = \frac{\frac{\Delta Q}{Q}}{-\frac{\Delta P}{P}}$$

(See Bain, *Price Theory* (1952), p. 40, ff.)

In our example, a price increase in submarket D₁ would result in a much smaller reduction in quantity demanded than an equivalent reduction in submarket D₂. Demand in submarket D₁ is, therefore, relatively inelastic, and demand in D₂ is relatively elastic. It is important to understand why this can be so. If we assume that all of our seller's customers are businesses which in turn resell goods, their demand is determined primarily by

The requirements for this kind of price discrimination are fairly obvious. The seller must have some monopoly power, otherwise the *higher* price would be bid down by competing sellers.⁹ Secondly, the seller must be able to *separate* his total market into the relevant submarkets, i.e., to "segregate" buyers that have different elasticities of demand, to prevent his low-price buyers from reselling to his high-price customers in competition with him and thus beating down his price. This is of course not always possible; a "Good Humor" man, for example, might well be surrounded by kids willing to pay rather widely varying prices for popsicles but he would "discriminate" in this situation at his peril. On the other hand, certain professionals—such as doctors and lawyers—regularly discriminate by charging one fee to wealthy people and another to the less affluent, quite apart from any consideration of "charity." In the case of medical services, for example, a poor man can hardly "resell" a doctor's treatment to a wealthy man. Nor do rich men become poor in order to obtain cheaper medical service. Should the "Good Humor" man attempt to discriminate, on the other hand, there would be nothing to prevent an enterprising kid from buying at the low price and competing with him for the "high price market," eventually (if not immediately) driving the price down to the lower level. To put it another way, this kind of discrimination requires something that keeps customers from moving from the high priced market to the low priced market, and something that keeps the goods bought in the low priced market from being resold in the high priced market in competition with those being sold by the discriminating seller.

It is reasonable to expect profit maximizing discrimination to be a rather stable and long lasting phenomenon. The market characteristics which induce it and make it possible are not likely to change rapidly.

Perhaps the most significant examples of this kind of discrimination for public policy are volume or "quantity discounts." Either of these may represent efforts to maximize profits by discriminating between large customers with highly elastic demand and smaller customers whose demand is generally much less elastic.¹⁰

Promotional price discrimination is a marketing tactic designed to either expand or defend the seller's market share, as such. It serves the same purpose as other promotional devices such as advertising, special programs, price cutting, etc.¹¹ And it can of course include "predatory" price discrimination. The extent to which it can be employed would seem to be directly related to the monopoly power of the firm.

In general, we would expect promotional discrimination to be a relatively unstable and short term device. Unless some element of profit maximizing is

two factors, the availability of substitutes for the commodity and the proportion of the firms income that is spent on the commodity. (Davisson and Ranlett, *An Introduction to Microeconomic Theory* (1956), pp. 58-59.) Since our submarkets D1 and D2 are all part of one overall market, we will assume that they both spend the same proportion of their income on our seller's product. Therefore the differences in their demand elasticities indicates that firms in D2 (presumably larger customers) have alternative sources of supply available to them that are not available to firms in submarket D1 (presumably smaller customers). These alternate sources of supply can include the larger firm's potential for backward integration, or their access to suppliers in other geographical areas.

This difference in the elasticities of demand enable the seller to increase his revenue by discriminating between the two submarkets at the price P1, a price that will maximize his price in *that submarket* and which results in quantity C1 being sold. In the second submarket, the seller chooses price P2, one that results in his profit being maximized in that market.

The proof of why this discrimination will result in a higher profit than can be obtained by any single price is not difficult, nor is the description of how the seller goes about selecting his profit maximizing price in each submarket. They are, however, rather lengthy and since they are readily available in Bain (*Price Theory*, pp. 403-413), we shall not repeat them here.

⁹ See Robinson, *Economics of Imperfect Competition* (1934) pp. 179-180, for a discussion of the kind of monopoly power required.

¹⁰ Certain quantity discounts have displayed incredible vitality. In spite of repeated Commission attack, the National Biscuit Company has maintained a quantity discount for over twenty-five years, albeit with substantial modifications. *National Biscuit Company*, Docket No. 5013, 38 F.T.C. 213 (1949); 50 F.T.C. 932 (1954).

¹¹ Dean, *Managerial Economics* (1951) pp. 515-516.

present, the seller should either fairly quickly accomplish his promotional goal or find it unprofitable to continue.¹²

Various kinds of anticompetitive collusion can *incidentally* result in price discrimination. Basing point and delivered price systems are the usual examples. Since the collusion itself is the proper target for public policy here, it seems pointless to discuss the discriminatory side effects as if they had any separate significance.

B. Effects of Profit Maximizing Price Discrimination

The possible injurious effects of profit maximizing price discrimination fall into three general categories: (1) reduction of the general welfare, (2) misallocation of resources, and (3) injury to competition.¹³ The first, reduction of the general welfare results from the fact that the discriminating seller may arrive at a total output which is less than he would have produced if he had sold at a single price and is compounded by the further fact that, because of his discrimination, the total cost to the public may be higher for this reduced quantity of goods. The *general* public welfare is therefore injured to the extent that the discrimination in question results in (a) restricted output and (b) higher average prices.¹⁴

Secondly, as between the favored and unfavored submarkets, price discrimination results in a "misallocation of resources." Too much output will tend to be allocated to the submarket with the more "elastic" demand (the low price or competitive market) and too little will tend to be allocated to the submarket with less elastic demand (the high price or noncompetitive market).¹⁵

Competition may be injured by profit maximizing price discrimination in three ways: (1) the discrimination may have a direct effect on a competitor's ability to survive in the submarket where the seller is charging the lower price (in legal terms, "primary line" injury); (2) customers in the unfavored submarket may have their ability to compete jeopardized by the discrimination ("secondary line" injury); (3) the discrimination may result in a restructuring of the market at either the primary or secondary levels, e.g., increased concentration or higher barriers to entry in the market of the discriminating seller.¹⁶

The possible secondary line injury may have a somewhat lesser significance than one is generally inclined to give it. The fact that a seller can separate out a specific customer class and subject it to unfavored treatment indicates that the class is already in a disadvantageous position, and therefore that the price discrimination is more likely a symptom and a measure of the disadvantage rather than a cause. It should be remembered, of course, that here we are discussing what is, by definition, a stable long term situation. A seller who is discriminating in order to maximize his profits should not be expected to *deliberately* inflict serious injury on his unfavored submarket. He is certainly exploiting an existing disadvantage but he defeats his own purpose if he actually caused the *demise* of firms in the unfavored submarket, those from whom he is extracting his most profitable prices.

¹² Predatory tactics can of course be quite expensive. See McGee, *Predatory Price Cutting*: the Standard Oil (N.J.) Case 1 J. of Law & Economics 137, at p. 168 (1958).

An apparent problem comes immediately to mind here, the situation where the seller is forced to give a discriminatory discount to a large customer in order to defend his market share. This can in fact result in stable long-term discrimination. However, this does no violence to our classifications. The ability of the large customer to make a credible threat means that his demand curve, as regards this seller, has shifted, i.e., has realistic alternatives not available to other customers (perhaps the ability to integrate backwards). As a result, the seller is forced to segment his market in order to maximize his profits and hold his market share. This is a significant point and we shall have more to say about it below.

¹³ The "welfare" effects of restricting output and misallocating resources are somewhat beyond our present scope. In certain real situations, they may well be impossible to measure. They are very important, however, in that they have been the focus of almost all economic studies of price discrimination. What little price discrimination theory we can apply to R-P enforcement is more or less the product of these studies.

¹⁴ Whether or not this happens depends upon the shapes of the demand curves in the submarkets. Bain, *Price Theory*, p. 413. See also Robinson, *Economics of Imperfect Competition* (1938) pp. 190-195.

¹⁵ Bain, *Price Theory*, p. 414. "Rational allocation of resources," a rather difficult and technical concept, is at the center of price theory; it is nothing less than the logically developed explanation for the efficiency of the free market or capitalist system. See Robert Dorfman, *Prices and Markets* (1967), for a brief introduction to the notion involved.

¹⁶ Kahn, *Discriminatory Pricing As a Barrier to Entry: The Spark Plug Litigation*, 8 J. of Industrial Economics 1 (1959); Brooks, *Volume Discounts as Barriers to Entry and Access*, 69 J. Pol. Econ. 63 (1961).

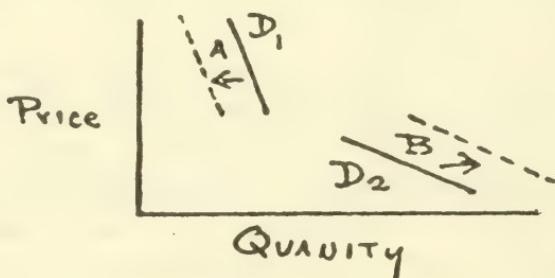
Assume, for example, that a seller in order to discriminate has divided his customers into two classes. If he then proceeds to cause competitive injury to one of them—i.e., to lessen its market share—that will of course result in a proportionate decrease in demand for the seller's own product in that particular market. And the converse is also true; if either submarket is able to exploit a competitive advantage, it will thereby increase its demand for the seller's product. Now assume further that any reduction of demand in the unfavored submarket would result in equal increase in demand in the favored submarket.¹⁷ The seller would obviously suffer a loss of net revenue from any transfer of demand from the high price (inelastic) market to the low price (elastic) market. It is therefore reasonable to assume the seller will not use discrimination to inflict competitive injury on the high priced submarket *if he can avoid it*. In fact the seller has every incentive to attempt to transfer demand to the high priced market, not the other way around.

By now the basic problem with this hypothetical should be readily apparent. In real life, the seller rarely has any incentive to be concerned about the lot of his unfavored customers. This is not because the matter is of no interest to him, but rather because there is nothing *he* can do about it. A typical situation is illustrated by the seller who provides only one type of product to retail grocers. His decision to discriminate to any extent against smaller retailers will not *by itself* have any impact on their viability. He does not, nor does any other supplier, provide a significant enough percentage of that retailer's total requirements. His individual decision to reduce or eliminate his discriminatory price will be of no consequence to any single retailer.

All of this is not to say that discrimination by all suppliers will not injure the smaller retailers. Of course it can. Our point is merely that the discrimination is not the beginning of the disfavored submarkets troubles, and in any case secondary line injury is never the result *intended* by the discriminating seller.

Primary line injury should not result solely from the fact that the competitors of the discriminating seller are faced with the lower price in part or all of their market.¹⁸ That "low" price itself could still be one that exceeds the competitive level and that is thus more than sufficient to assure the long run survival of all of its competitors that are reasonably efficient. Only if the price is driven *below* this level—below the point where it is covering all production and distribution costs, plus a normal or competitive return on the capital employed—

¹⁷ This would be the best possible result from the seller's viewpoint of any competitive injury in the high priced submarket. (In any real situation, the seller could not expect to recoup one hundred percent of what he loses in one submarket by a gain in another, particularly where the demand is lost in the submarket where the seller has more monopoly power than in the submarket where demand is gained.) Graphically, the matter might be illustrated thus:



D₁ represents the original demand curve of the unfavored submarket; D₂, that of the favored submarket. The dotted lines represent the curves after transfer of demand from D₁ to D₂. Distances A and B are equal.

¹⁸ A seller practicing profit maximizing discrimination will not lower his price in the favored submarket below his marginal costs in any case.

can any reasonably efficient (and thus competitively significant) firm be eliminated by it.¹⁹

Perhaps the most serious consequence of profit maximizing price discrimination is the barrier it raises to entry into the seller's market.²⁰ Consider, for example, the situation in which a new food producer decides to sell his product to a retail grocery firm that is presently buying this product from another producer, one that is giving him a large "quantity discount." If the retailer were to turn now and purchase any significant amount from the *new* producer, he would, in effect, raise the price of all his purchases from the other producer. Naturally the retailer will be most reluctant to give serious consideration to the new producer under these circumstances. And of course it is the large retailers who are already earning large quantity discounts that are most important to the new producer trying to expand his production in order to realize all possible economies of scale. (This effect is multiplied if the established firms have a highly differentiated product which, because of the demand generated by advertising, the retailers believe they *must* stock in large quantity.)

Profit maximizing discrimination can induce anticompetitive restructuring of the buying market. Long term volume discounts, for example, which give an advantage to the larger purchasers tend to force the firms in the purchasing market to combine, either by merger, or by the formation of buying groups, until they reach a size sufficient to support purchases in the lowest price category. This may result in a buying market much more concentrated than would be dictated by the needs of any "real" economies of scale in the absence of the volume discounts.

It is worth pausing briefly to consider the possible beneficial effects of profit maximizing discrimination, if for no other reason than to dispel the notion that price discrimination is inherently evil, surrounded as it were by an odor of immorality. In fact it is *per se* neutral, and must be judged by its consequences. Where there are decreasing average and marginal costs, profit maximizing discrimination can result in greater output at lower prices *even for the disfavored submarkets*. It may even result in some submarkets being served which could not be otherwise served at all under a one price system.²¹

Additionally, where the seller is part of a tight oligopoly, a lower price granted to a large buyer may have beneficial effects, if the large buyer must sell in a competitive market and pass the price reduction on to the consumers.

C. Effects of Promotional Price Discrimination

We will now consider the effects of promotional price discrimination, which we have defined as any discrimination which has as its purpose expanding or defending market share. We identify at least six possible injurious effects that may result from promotional discrimination. The first two are the same welfare effects that we discussed with regard to profit maximizing discrimination, namely, reductions of total output and misallocation of resources. Since we have already explored them sufficiently for present purposes and particularly because they have only very limited significance for short term promotional discrimination, we will not consider them further here.

The third possible bad effect of promotional discrimination is that it may injure competition at the primary level. The classic example of course is that of the giant multimarket concern using monopoly profits from one market to finance predatory pricing in another. The extent to which this kind of tactic can be used is obviously dependent upon the seller's market power. But it also depends upon the condition of entry into the seller's own industry. Ease of entry represents a serious limit on the extent to which firms can profitably use predatory pricing. The only reason for driving a competitor under is to be able to realize a greater return on sales after his elimination. But low entry barriers can render this a futile endeavor. Any attempt on the part of the seller to reap the benefits of his new monopoly power will simply induce new entrants,

¹⁹ We cannot see how competition is injured if the lower price is not below long run average costs. There is the notion that the competitors of the discriminating seller could use super competitive profits to enable them to expand into the discriminating seller's protected market. But this is a very weak argument. There is no reason to believe that high profits in one market have any relation to entry into another. If entry into the protected market of the discriminating seller really appeared to be a profitable opportunity, competitors would find the capital.

²⁰ See note 16 *supra*.

²¹ Bain, *Price Theory*, pp. 413-414.

firms eager to profit from the observed high prices. Clearly, then, predatory pricing requires significant entry barriers.²²

This brings us to the fourth possible harmful effect of promotional discrimination, the possibility that the ability of a dominant firm to engage in predatory pricing can *itself* be a barrier to entry. The theory here is that the firm which has successfully used such tactics will "scare off" potential competitors.²³

The fifth possible anticompetitive effect of promotional discrimination is that it may injure competition at the secondary level. Presumably the practice is based on the seller's belief that a dollar price reduction to one group of customers is worth more to him than the same reduction to another group. Again, the seller has no reason to cause secondary line injury, if he can avoid it. This purpose is to expand his sales. To the extent that the promotional effort merely causes a *redistribution of market share among the seller's customers*, it is a failure. However, the seller will rationally engage in promotional discrimination in spite of secondary line injury as long as he believes that what is lost by injuring the unfavored customers is more than made up by an expansion of his sales to and profits from the favored customers.

Finally, promotional price discrimination can be used to perpetuate anti-competitive patterns of conduct in an industry. For example, a dominant firm can use discriminatory pricing to discipline a firm which breaks ranks and engages in price cutting.²⁴

Promotional price discrimination has two possible procompetitive uses. In an oligopolistic situation, price discrimination can be the chief source of price competition.²⁵ Oligopolists, aware of the fact that retaliation by competitors can generally be expected to make price cutting unprofitable for all, typically refuse to reduce prices *across the board*. However, they are constantly tempted to selectively shade prices to capture or keep certain particularly large accounts and this can trigger an outbreak of general, overall price competition. While it is easy to question the significance of this kind of competition, the fact remains that it is all we can expect to get in these oligopolistic markets; they simply do not compete in any but this discriminatory fashion, and we are thus faced with a take-it-or-leave-it situation, i.e., we get prices reduced "selectively" (discriminately) or we don't get them reduced *at all* (assuming an unwillingness to reduce the concentration levels themselves). As an illustration of what is involved here, Dr. John M. Kuhlman of the University of Missouri and a former consultant to the Commission—a specialist in the area of price fixing—has advised us that, following the "break-up" of a price fixing conspiracy, the ensuing price decline (generally a decline of about 25%) *invariably occurs in a discriminatory fashion*. Since price fixing occurs most frequently in industries that are at least somewhat concentrated (e.g., at least "loose oligopolies," with the eight largest holding, say, 30% or more of the market), and since, as noted, oligopolists find it unprofitable to compete on price openly, the break-up of the conspiracy is characterized, in the beginning, by a few secret discriminatory price concessions to one or more of the very largest customer accounts. Loss of one of these accounts ultimately tips the other former conspirators off to the fact that price cutting is going on, and they retaliate by making concessions to one or more *other* large accounts, thus deepening and "spreading" the price decline. Gradually, then, in this reverse-ratchet manner, the price to at least the bulk of the larger customers works its way down from the inflated conspiratorial price to the normal competitive one. During that price decline, discrimination has of course been rampant, with price varying almost from customer to customer as the former conspirators offer whatever price they happen to think will be necessary to get a particular account, without too much regard for the niceties of statutory requirements. To prevent this kind of discrimination would be, unfortunately, to prevent the restoration of the competitive price itself.²⁶

²² Bain, *Barriers to New Competition* (1956), p. 34.

²³ Brooks, *op. cit. supra*, note 16, at 46.

²⁴ *Ibid.*

²⁵ Dirlam and Kahn, *Fair Competition: The Law and Economics* (1954), pp. 233-234. Also Fixler, *Price Discrimination in Homogeneous Oligopoly* 1 Antitrust Law & Economics Rev. 117 (1967).

²⁶ Professor Kuhlman also notes, with considerable amusement, that if the Division of Discriminatory Practices was sufficiently alert, it would completely undo all efforts of the Division of General Trade Restraints to stop price fixing. As soon as General Trade Restraints had obtained an order, the prices would fall but in a discriminatory fashion. Discriminatory Practices would then file a complaint and "restore the fix."

Promotional price discrimination, a device of considerable importance to small firms, can have pro-competitive effects when used by firms entering new markets. Special promotional discounts are particularly vital to small business in competition with large dominant firms. The small business simply does not have the arsenal of promotional weapons that is available to the large concern, a fact that was dramatically illustrated during the NRA experience when small business raised a strong protest against the codes which limited their use of price competition.²⁷

D. "Inducing" and Advertising Allowances

Two matters deserve some preliminary comment here. The first is the question of "inducement" of a lower price by a "power buyer." The second is the question of advertising allowances.

As to the matter of "inducement," notwithstanding the outrageous volume of literature to the contrary, we simply do not find the concept particularly useful. It adds nothing, in our view, to a meaningful analysis. It requires only a small amount of economic sophistication to recognize that *all* prices are "induced." Even when the buyers have no *individual* market power, their collective willingness to buy or not at any given price constitutes "inducement," i.e., the total "demand" for the product in question. As the market power of the buyer increases, the issue here tends to become charged with a rather large amount of emotion. Moral indignation may of course be highly appropriate but it should not be allowed to interfere with a careful examination of precisely what happens in such a situation. From the seller's point of view, as we have noted before, the "inducement" simply means he faces a "flatter" demand curve in at least a portion of his market. The buyer, on the other hand, is able to "induce" the lower price *only because he has alternative sources where he can obtain the same product for an equally low price.*²⁸ This point bears repetition. *Nothing else enables the large buyer to "induce" his lower price except the ability to obtain the same item at a similar price from an alternate source.* "Market power" on the side of buyer—no matter how great—is by itself insufficient. Thus from the buyer's point of view, the product is "worth" no more than the "induced" lower price, because he can get it somewhere else just as cheap. The concept of inducement, therefore, contributes nothing except rhetoric to an analysis of the conduct of the small seller and the so-called "power buyer."

The second matter deserving special comment concerns promotional allowances. As is recognized by the Act itself, this practice can be used to conceal what are in effect price discriminations. But there are other, less widely recognized implications for public policy in this practice. There is a substantial amount of evidence that *product differentiation created by mass advertising is the prime cause of increased concentration in the consumer goods industry.*²⁹ a fact that cannot rationally be ignored in developing a public policy towards promotional allowances. Cooperative advertising programs may account for as much as 20 percent of national expenditures for advertising.³⁰

Two questions, then seem highly relevant here. First, does cooperative advertising affect the total volume of advertising? And, second, does such advertising tend to be of an "informational" nature (i.e., is it procompetitive)

²⁷ "A study of the codes as a whole could only conclude that most of the price clauses were directed against price cutting by 'little fellows.' In numerous industries the advantage of large firms lay not so much in the area of price as it did in non-price fields, in such matters as advertising, access to credit, ability to conduct research, control of patents, and attraction of the best managerial talent. Small firms often existed only because they offered lower prices to offset consumer preference for advertised brands, prices sometimes made possible by lower wage rates, sometimes by more favorable location, sometimes by other advantages arising out of specialization or recapitalization. It was in the interest of large firms, therefore, to eliminate price and wage differentials and wipe out the special advantages that made them possible." Ellis W. Hawley, *The New Deal and the Problem of Monopoly* (1966) p. 83. In short, price competition is of most value to small business itself, not to its larger competitors.

²⁸ This of course indicates a serious defect in the "countervailing power" theory of J. K. Galbraith (*American Capitalism* (1952) Chaps. 9 and 10). Where there are no alternate sources of supply available the "power buyer," he cannot induce a lower price no matter how large or powerful he might be.

²⁹ *Studies by the Staff of the Cabinet Committee on Price Stability* (1969), pp. 68-69.

³⁰ John Robert Davidson, *A Study of the Effect of the Robinson-Patman Act Upon Cooperative Advertising Policies and Practices* (Ohio State University, 1959), Vol. 20 Dissertation Abstract, p. 4300.

Elsewhere it has been estimated that cooperative advertising in 1959 amounted to nine hundred million dollars or 25% of all newspaper advertising.

Recent estimates state that 30% of all department store advertising (approximately 13 $\frac{3}{4}$ to 2 billion dollars) is paid for by supplies under cooperative programs.

or does it tend to contribute to product differentiation (i.e., is it anti-competitive)?

It would seem that an advertising allowance is an attempt by the seller to impose his business judgment on his customers: he is trying to compel the customer to promote his product in one particular way, i.e., by advertising, rather than letting him use some other device, e.g., price reductions. We do not know of course the extent, if any, to which this practice affects total national volume of advertising, but we believe the answers would have considerable significance for public policy. And equally significant is the question of the nature of cooperative advertising. Since most of it appears in newspapers, the initial inference is that much of it is probably informational and thus pro-competitive; it is hard to run a newspaper ad without telling what, where, and how much. But again, we have no firm data.

E. Policy Implications

There are a number of key questions that are basic to a national evaluation of enforcement policy in the price discrimination area, i.e., there are several things that have to be known before one can rationally say that a certain type of price discrimination injures competition.

We will consider first the problems of discrimination at the primary level. Where the discrimination here is of the profit maximizing variety, the most significant injury done to the sellers' competitors is the limit it places on their ability to expand their sales in the favored market.³¹ This particular type of discrimination is generally easier to detect and identify than most of the other types of discrimination and is usually quite stable and long lasting, even "traditional" in the affected industries. It is probably impossible to conceal from competitors, who are bound to find out in the long run and either complain rather loudly or try to imitate it.³² Like all discrimination of this type, it requires some market power. The seller's industry must have a concentration ratio placing it at least in the category of a "loose oligopoly," e.g., an eight-firm ratio of at least 30% or more. And some entry barriers must exist to protect the seller's monopoly profits in the high priced market. The really key structural feature in this situation, however, appears to be product differentiation. Not only does extensive product differentiation contribute to high concentration and high entry barriers, but it multiplies the barrier effect of the discrimination within the favored submarket.

Unfortunately, very little empirical study has been done on this particular effect. And while entry barriers can be measured with considerable accuracy, we know of no attempt to measure the precise contribution that price discrimination has made to the entry barriers in any particular industry.³³ Nor do we have any study estimating the aggregate effect of the practice.

Some particularly complex problems are encountered in trying to assess the competitive effects of primary line promotional or predatory discrimination. First of all, there are two varieties of primary line discrimination that have the almost universal blessing of the economic authorities. Promotional price discrimination *by members of a tightly structured oligopoly* is generally considered beneficial on the theory that *any* kind of price competition is better than none at all. Also, there is general agreement that price discrimination *by a new entrant* to break into a new market is pro-competitive, at least where the market is being entered is less than workably competitive. On the other hand, there is almost universal condemnation of the practice where it is a large multi-market firm that is using its monopoly power in one market to finance predatory pricing in another.³⁴

Unfortunately, these general statements raise as many questions as they answer. Should we approve of a large national conglomerate's use of geographic price discrimination to challenge a local monopoly? Or a large oligopolist's use of prices that are below his competitor's costs? Is this kind of price competition really better than none at all?

Facile generalities are clearly out of place here. Perhaps the best we can do is to set out the *minimum data that ought to be known* before a judgment is made about such matters in the particular case. Obviously a great deal ought

³¹ See note 16 supra.

³² *National Biscuit Company*, Dk. 5013; *Sunshine Biscuit* Dk. 6191; *United Biscuit Company*, Dk. 8717.

³³ For an excellent example of the measurement of entry barriers see Moore and Walsh, *Market Structure of the Agriculture Industries* (1966), pp. 390-391.

³⁴ E.g. Edwards, *Maintaining Competition* (1949), pp. 169-170.

to be known concerning the discriminating seller: Its absolute size, its relative market share in each of its markets, whether it is a new entrant, whether it sell a differentiated product and, perhaps most important of all, whether its discriminatory price is below long run marginal costs.³⁵ Equally essential is at least some similar data on the market where the discrimination occurs: Is it concentrated? What are the entry barriers? Is there product differentiation? Are prices above the competitive level? Is there price collusion?

We are by no means prepared to suggest that all of this information will guarantee the ability to make even reasonably accurate decisions in every conceivable case. But we feel quite certain that, *without* this data, no rational judgment can be made at all.

It is appropriate to note here our conviction that predatory price discrimination has drawn far greater attention than it appears to merit. We do not think it would be much of an exaggeration to say that the antitrust profession appears to harbor something of an obsession with the subject, one quite out of proportion to its real importance.³⁶ In the first instance, the number of actually documented cases is quite small.³⁷ And we have been unable to discover any authorities who consider price discrimination to have significantly contributed to the rise of monopoly in any major American industry. Certainly it does not deserve to be in the same class, with for example, mergers, heavy advertising, exclusive dealing agreements, and patent abuse.

This curious lack of perspective can have some rather serious consequences. In a case of real predatory pricing, it seems perversely myopic to focus on the price discrimination aspect of the problem. A prohibition against *future* predatory pricing is most unlikely to be an effective remedy, since the predator has almost always completed his monopolization of the market in question before a case can be developed and tried.³⁸ In addition, a firm with sufficient size or market power to engage in this kind of practice usually has available a whole range of options which can be equally as effective as predatory pricing. How does the public benefit if a predatory firm diverts its resources away from geographic price discrimination and concentrates instead on extremely heavy advertising in selected local areas?

Part II. Statistical Analysis of Enforcement Policy

We have made no effort to repeat or match the extensive statistical analysis done by Professor Corwin Edwards in 1957. We have, however, compiled the following tables believing that if there is a discernable enforcement pattern, it should have appeared here by now.

TABLE I.—NUMBER OF ORDERS ISSUED UNDER EACH SECTION, 1936-69

Section of act	Total number of orders	Percent of total
2(a).....	180	17.7
2(c).....	259	25.5
2(d).....	491	48.2
2(e).....	6	.6
2(f).....	22	2.1
More than 1 section.....	60	5.9
Total.....	1,018	100.0

³⁵ See note 19 *supra*.

³⁶ This phenomena seems to have deep roots. To the extent anyone can tell, it seems to have started during the Depression. To the economically naive businessman (a description that includes not a few lawyers) the Depression had a simple explanation: prices were too low. His were low because his competitor across the street had cut his. And somewhere there was a guy who started it all, "Ruinous price wars," "excess competition," "price chiseling" were the result. See Hawley, *The New Deal and the Problem of Monopoly* (1966), pp. 38-41, 54, 248-249.

³⁷ These certainly include: *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1 (1911); *Moore v. Meads Fine Bread Co.*, 348 U.S. 115 (1954); *E. B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir., 1944); *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir., 1957); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir., 1959), cert. denied 363 U.S. 843 (1959); *Forster Mfg. Co., Inc.*, 62 FTC 852 (1963).

³⁸ E.g., *Forster Mfg. Co., Inc.*, 62 F.T.C. 852 at 899-890 (1963).

TABLE 2.—NUMBER OF ORDERS ISSUED UNDER EACH STATUTORY SECTION, 1957-69

Section of act	Total number of orders	Percent of total
2(a).....	79	11.1
2(c).....	114	16.2
2(d).....	464	65.7
2(e).....	1	.1
2(f).....	15	2.1
More than 1 section.....	34	4.8
Total.....	707	100.0

TABLE 3.—ENFORCEMENT BY SECTION IN SELECTED INDUSTRIES, 1936-57

Industries	2(a)	2(c)	2(d)	2(e)	2(f)	Comb.	Total	Percentages
Food.....	28	125	12	0	3	11	179	52.5
Fruit and vegetables.....	1	27	—	—	—	1	(29)	—
Seafood.....	—	28	—	—	—	—	(28)	—
Bakery products.....	2	1	2	—	—	—	(5)	—
Dairy products.....	3	—	1	—	—	—	(4)	—
Candy.....	3	1	2	0	1	5	(12)	—
Apparel.....	2	13	2	—	—	1	18	5.8
Auto parts.....	14	—	—	—	—	1	15	4.8
Cosmetics.....	1	—	3	3	—	3	10	3.2
Publishing.....	6	—	—	1	—	—	7	2.3
Corn products.....	8	—	—	—	—	1	9	2.9
Others.....	41	7	10	1	4	9	73	23.5
Total.....	101	145	27	5	7	26	311	100.0

TABLE 4.—ENFORCEMENT BY SECTION IN SELECTED INDUSTRIES, 1957-69

Industries	2(a)	2(c)	2(d)	2(e)	2(f)	Multi-count	Total	Percentages
Food.....	24	109	17	1	—	15	166	23.5
Citrus fruit.....	—	87	—	—	—	—	(87)	—
Seafood.....	—	28	—	—	—	—	(28)	—
Bakery products.....	6	—	1	—	—	2	(9)	—
Milk.....	5	—	—	—	—	3	(3)	—
Macaroni.....	—	3	—	—	—	5	(8)	—
Candy.....	3	1	—	—	—	—	(4)	—
Apparel.....	1	—	307	—	—	—	308	43.7
Publishing.....	—	—	58	—	—	—	58	8.2
Auto parts.....	21	—	—	14	2	—	37	5.2
Rugs and carpets.....	11	—	—	—	1	—	12	1.7
Toys.....	2	—	26	—	1	—	28	4.0
Cosmetics and toiletries.....	1	—	7	—	—	—	8	1.1
Others.....	20	5	48	0	0	16	89	12.6
Totals.....	79	114	464	1	15	34	707	100.0

Perhaps the most striking thing about all of these tables is the lack of any really significant pattern. We have no reason to believe that price discrimination had any special significance in these industries, as compared with any others. We do not know, for example, that discriminatory conduct was unusually prevalent in any of them. Nor do we even know that structural factors made it particularly harmful there. But most important, we do not know how the challenged discrimination was likely to affect the structure of these industries.

There are, of course, some exceptions to this general lack of data. The 1966 *Staff Report to the Federal Trade Commission on the Structure and Competitive Behavior of Food Retailing* presented some highly relevant information concerning discrimination in the milk and bread industries.²⁰ But these account for only a small percentage of cases.

Some critics have focused on the fact that large numbers of cases have been brought in certain industries—and from this have drawn some generally un-

²⁰ Pp. 186-193.

favorable interferences. This strikes us as not just unfair, but as quite irrelevant. Numbers of cases alone do not give a valid indication of the enforcement policies. Most of the large groups of cases listed here involved consent orders which were procured on an almost "mass" basis, presumably with significant savings in resources. For example, it is very hard to draw an inference, favorable or unfavorable, from the existence of twenty-six (26) cases in the toy industry.

We are, again, simply unable to detect a significant pattern in the enforcement statistics.

Part III.—Legal and Administrative Problems

The legal and administrative problems surrounding the enforcement of the Robinson-Patman Act have been widely recognized. But what has not been recognized is that many serious problems do not appear until after an order has been issued.

Almost inevitably the factual issues which arise in the compliance phase of a case are more complex than those involved in the litigation. Typically a case involves a firm with a large, complex distribution system (the firm need not be large, however; small firms often have very complex distribution systems). A broad order is issued, predicated on a limited number of proven violations. Immediately a whole range of practices come within the Commission's purview, many of which were never contemplated in the complaint.

The legal proposition that the Commission does not have to prove injury to competition in a suit for violation of a price discrimination order creates more complications than it avoids. If injury is irrelevant, every price discrimination, regardless of its significance, is an order violation and may result in a penalty suit. Obviously it is very difficult for the staff, on its own initiative, to consider the violation of an order *de minimis*.

There is a further related problem. While it may be proper for the trial staff to anticipate some real economies from attacking the "inducement" of discriminatory prices and allowances (by, say, a large grocery chain), rather than proceeding against virtually hundreds of suppliers, there is no comparable savings to the Compliance Division in such a procedure. Eventually someone will have to examine the relationship between the respondent buyer and *each* of his hundreds of suppliers. And since the orders issued under the Robinson-Patman Act usually run in perpetuity, a half dozen such orders can tie down a number of attorneys for substantial periods of time.

The worst of these problems stem from the various cost justifications included in reports of compliance. A staggering combination of skills is required to properly review such a report, not to mention the vast number of man hours. But what is most significant here is the fact that there is no satisfactory process outside of an adversary proceeding (and even here one can harbor reservations) for checking the validity of the representation made in such a cost study. These studies depend upon a host of factual assertions that are completely beyond the power of the staff to either verify or refute. We are thus left with the Hobson's choice of either having to accept the respondent's word for it or challenge the report via a full *de novo* investigation.

Obtaining compliance with orders issued under Section 2(d) is beset with similar problems. It is simply impossible to police every promotional program issued by every seller under such an order. A great deal of compliance work consists of making respondents make "offers" to customers who will not under any circumstances accept them. (A large number of retailers simply have no use at all for the "alternative" programs that the orders say must be made "available" to them. Nonetheless, a great deal of effort is continually expended in compelling the respondents to make these ritualistic recitations of these meaningless offers.)

Another post-order problem is the fact that Robinson-Patman orders are remarkably easy to evade *legally*. In fact, we suspect that the real effect of an order is in inverse proportion to the intelligence and imagination enjoyed by the respondent; the gifted remain substantially unscarred. There are, of course, the obvious evasions: "inducing" orders can be evaded by backward integration or by purchasing the whole output of a supplier. Orders prohibiting discriminatory pricing by suppliers can be evaded by a special product of a slightly different "grade and quality" for the favored customer. And of course predatory advertising in local areas can generally substitute quite well for geographic price discrimination. But what we have in mind here are the really cunning evasions. Consider, for example, the case where a manufacturer is

placed under an order which attempts to prohibit it from favoring certain large retail customers. To comply with the order, the manufacturer sells only to wholesalers. But on merchandise resold to the formerly favored retailers, he grants significant price reductions. The manufacturer is, of course, not discriminating between the wholesalers, because each is free to compete for the patronage of the favored retailers. And the lower price charged by the wholesaler is of course "cost justified." (This is not a "rainy day hypothetical." See the compliance report filed in *Armstrong Cork Co.*, Docket C-1010.)

The Commission's Rules place a premium on "trying out" various schemes of marginal legality by not permitting the filing of a civil penalty suit until the respondent has been informed of the deficiencies in his compliance report.⁴⁰ If one clever scheme fails to get approval, there is every reason to try another. A sort of immunity thus prevails as long as a report is kept pending disclosing his current activities.

There are of course those who either out of a perverse sporting instinct or because of perhaps somewhat sociopathic inclinations simply prefer to violate their orders outright and then use their imagination and intelligence to avoid detection. Of these, the dull and careless provide the material for our civil penalty suits.

There is a growing body of literature which holds that cease and desist orders aimed at preventing anticompetitive conduct are usually ineffective, at least when compared with "instructual" remedies.⁴¹ Businessmen are most unlikely to view with any enthusiasm these efforts to interfere with what they consider their most profitable courses of action: the natural reaction is to yield to the temptation to carry on as before in one guise or another, being deterred only if the penalties are so high and so certain as to rather clearly outweigh the probable gain. Our experience with the Robinson-Patman Act hardly casts any strong doubts on this thesis. Directing a businessman to operate in a particular way then that mode of operation does not in fact conform to his idea of what is "good business" is thus likely to be wasted effort unless the penalties are so stiff, detection so easy, and evasion so difficult that it is simply easier to comply than to evade. The Robinson-Patman Act hardly fits any of these requirements.

Part IV. Conclusions

There are a distressingly small number of things that can be said in the price discrimination area with any real degree of assurance, and most of these things are, unfortunately, rather negative in character. First, it seems fairly clear to us that the Commission's orders in Robinson-Patman matters have not in general had any really substantial effect upon the pricing policies of the companies against whom they are directed. Even where these orders have had the effect of forcing some companies to change their pricing schemes, the "anti-competitive" results alleged by the Commission were in fact probably continued by alternative methods. Second, there presently are no available empirical data, nor is there even a theoretical framework, that would enable us to clearly judge the effectiveness of the Commission's Robinson-Patman activities. Third, in each case where there in fact exists serious price discrimination problems which appear to have clearly anti-competitive effects, the most effective, in fact the *only* effective remedy, would probably be a direct attack upon the structural characteristics producing not the "low" but the *high* price. Fourth, at the present time we do not possess either the empirical or theoretical data necessary to enable us to determine whether a particular price discrimination is in fact likely to be pro-competitive, anti-competitive, or neutral in its effects.

Furthermore, we are not at all certain that the resources necessary to develop this kind of information could not be better used in other areas, e.g., against mergers and collective monopolization, where we can be a great deal more certain of our ultimate results. It seems fairly clear, however, that it would be exceedingly difficult to justify the present utilization of almost 50% of the Commission's total antitrust resources in this area (one large Division plus a substantial part of the work of another one) until such information is developed.

Fifth, the criteria for evaluating the impact of price discriminations should be the same as those used to judge other conduct with a similar impact. Thus,

⁴⁰ Rule 3.61.

⁴¹ E.g., Bain, *Industrial Organization* (1959) pp. 489, 495, 496, 518-520. Elzinga, *Mergers: Their Causes and Cures*, Antitrust Law & Economics Rev. 53 (1968); Mueller, *The New Antitrust: A Structural Approach* 12 Vill. L. Rev. 764 (1967).

if a price discrimination in fact results in the elimination of a competitor or competitors and the shifting of their market shares to the leading firms in the industry, the economic result is essentially the same as if a *merger* had taken place between the "acquiring" firms and those whose market shares they have obtained. Considered in such a light, the relevant factors to be considered include the usual structure/performance data, e.g., concentration, barriers to entry, and product differentiation characteristics. If a merger of that size and character would not be worth challenging, then it would presumably be an unwise use of resources to attack a price discrimination that causes the same competitive result. (This is not to say that the *private* plaintiff should not have his relief in such a case, but only that a *public* agency such as the Commission could not rationally undertake to secure it for him.) Other practices provide similar guidelines. It is not clear, for example, as to why a volume discount which has the effect of foreclosing outlets to competitors should be treated more rigorously than an exclusive dealing arrangement which accomplishes the same end; the latter leaves no room for maneuver while the former, the elimination of a firm by predatory pricing, at least implies that it will be the least efficient of the smaller firms which are likely to suffer first and thus that their market shares will be up for grabs by *all* of the other members of the industry, rather than simply being transferred directly to the large firm. A volume discount may at least leave open the possibility of a rival firm substituting itself for the former supplier by quoting a lower price on the entire volume.

Perhaps most importantly of all, however, serious price discrimination is almost inevitably accompanied by numerous other anticompetitive structural conditions and practices, particularly high entry barriers, high degrees of product differentiation, excessive advertising, exclusive dealing systems, and so forth. To attack *one* of these indications of an anticompetitive structure without attacking the root cause of the problem may in fact be worse than taking no action at all. We have numerous examples of industries whose bad structures are due to exclusive dealing (e.g., automobiles), mergers (e.g., steel) and product differentiation (e.g., breakfast cereals) but there is no major highly concentrated industry today which we can safely say was produced primarily by price discrimination. In short, we simply do not know the long range effects of either price discrimination or of a policy of attempting to stop it. If there was any clear cut indication that price discrimination was in fact producing serious long range problems in major American industries, the single most productive step would be to begin the necessary research to identify those structural characteristics, and those types of discrimination, that in combination determine whether the effect of the practice is either anticompetitive, neutral, or procompetitive and, more important, to enable the Commission to evaluate the *degree* of anticompetitiveness involved, if any, and thus to rationally allocate resources between this and other Restraint of Trade areas.

Price discrimination differs in this respect from a number of the other matters antitrust is concerned with. A substantial amount of solid, empirical data is readily available on the effects of mergers, price fixing, exclusive dealing, high concentration, high entry barriers, high degrees of product differentiation, excessive advertising, and other types of vertical and horizontal restraints. When the researcher turns to price discrimination, however, there is virtually no data available. The unmistakable inference, unfortunately, is that this dearth of research on price discrimination reflects a substantial consensus in the scholarly community that any such effort would be unproductive, i.e., that the potential gains to be realized from even the most rationally-conceived antidiscrimination program would be more than offset by the cost of devising and administering it. The largest of these costs, of course, is what the economist calls the "opportunity cost": a thousand man-hours spent on any Robinson-Patman Act ceases necessarily means, given a fixed budget, a thousand man-hours withdrawn from an enticingly high-yield case is one of the three areas known to be most productive, namely, merger, price fixing, and deconcentration cases. None would care to defend a Commission policy of spending perhaps as much as 50% of its entire antitrust resources on a practice that has yet to be established as a productive means of promoting noncompetitive market structures and thus noncompetitive prices to the consuming public.

We believe that much of the emphasis on Robinson-Patman enforcement at the Commission is due in large measure to the high "visibility" of the entrepreneurs that are the natural constituents of the statute, as compared with the almost complete invisibility of the rather anonymous members of the con-

suming public that are the potential beneficiaries of competitive prices. Thus, no one has suggested the creation at the Federal Trade Commission of a "Division of Patent Abuse," even though one scholar has estimated that patent monopolies cost the American public something on the order of \$50 billion in lost output annually, some 90% of which (or about \$45 billion) is due to patent abuses that are already illegal under existing law. It goes without saying that even the most sanguine of Robinson-Patman enthusiasts would hardly claim any such potential benefits for an anti-price discrimination program of even the most heroic dimensions.

From our brief research here, we conclude that it would be impossible to justify on rational priority grounds the Commission's present commitment to price discrimination matters, given the severe budget limitations it faces and the exceedingly high yields available to it in the three kinds of cases mentioned above. Price discrimination in its genuinely anticompetitive forms is a creature of monopoly power and should be treated as such, namely, as an integral part of *monopoly* case. And, when attacked in a monopoly case, the remedy should be not an antidiscrimination order but the traditional monopoly solution, dissolution and divestiture.

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Mr. DINGELL. The Chair will recognize counsel of the subcommittee, Mr. Potvin.

Mr. POTVIN. Mr. Chairman.

Gentlemen, I suspect that in the interest of orderly procedure, a reasonable approach would be to ask you in summary fashion to explain to the subcommittee the substance and the thrust of your paper, and then we perhaps could have a discussion and then ask for what specific recommendations you might have thereafter.

**TESTIMONY OF HENRY M. BANTA AND H. ROBERT FIELD,
ATTORNEYS, DIVISION OF COMPLIANCE, FEDERAL TRADE
COMMISSION**

Mr. BANTA. If it is all right with the committee, Mr. Potvin, we have prepared a rather brief statement summarizing our position.

Mr. POTVIN. Do you have a copy that the reporter might have?

Mr. BANTA. I only have one copy.

Mr. POTVIN. Fine. Thank you.

Mr. BANTA. Mr. Chairman, I am Henry Banta and this is Robert Field, attorneys in the Compliance Division of the Bureau of Restraint of Trade, Federal Trade Commission. Both of us have been working in the Compliance Division for the last 4 years, working primarily on compliance matters dealing with orders issued under the Robinson-Patman Act.

We are appearing before this committee today at your request. The views we express are our own. We have not discussed any part of this statement or any aspect of our appearance before this committee with any member of the Commission or with any of our superiors.

Mr. Field and myself are authors of an FTC staff memorandum that was recently reported in an article in the Washington Post. We understand that this memorandum has been forwarded to this committee by the commission. The memorandum, which is approximately 50 pages in length, is a summary of an evaluation that the two of us made of the effects of Federal Trade Commission Antiprice discrimination orders issued under the Robinson-Patman Act. We undertook this evaluation in the spring of 1969 at the request of Mr. Joseph J. Gericke, Chief of the Compliance Division. It took us about 3 months to complete the evaluation.

In conducting the study, we tried to do two things. First we attempted to review the economic literature relevant to price discrimination and specifically to Robinson-Patman Act enforcement. From this

we wanted to identify the links between discriminatory pricing conduct and performance. In looking at performance, we were primarily concerned with price levels.

Our objective was to develop criteria for evaluating the probable effects of Robinson-Patman orders on industry prices.

The second thing we attempted to do was examine the actual pattern of the act's enforcement: How each subsection of the act has been used, and in which industries enforcement resources have been concentrated.

We also wanted to examine the legal and administrative problems arising in the compliance phase of enforcement and the consequence they had in allowing companies to avoid the economic remedy intended by the orders.

Our program to make an evaluation of Robinson-Patman orders was hindered by a basic problem faced by regulators in the price discrimination area. This problem is the lack of theoretical predictions linking price discrimination to industry price performance.

Unlike many areas of antitrust such as price fixing, monopolization or mergers where the link is either obvious or where there are strong theoretical and empirical links between structure and performance, there is no such body of literature in the price discrimination area.

For example, price discrimination is often a characteristic of soft markets. When supply exceeds demands, some sellers start to shade prices. This shading often leads to a general reduction in industry prices to a new equilibrium level. In this example, price discrimination is simply an aspect of market adjustment.

In other cases price discrimination might be a predatory tactic employed by a monopolist. We think that because of the differing possibilities it is not an appropriate subject for generalities.

Even in a single case the effects may be mixed. For example, one price discrimination may cause serious competitive injury at the retail level while promoting competition in an otherwise monopolistic producer level. Unless a great deal is known about the structure of each market level, the enforcement runs the risk of doing more harm than good. A great deal of economic analysis is always required.

To illustrate the difficulty that a lack of economic analysis in a price discrimination case may lead to, we would like to call your attention to evidence developed in a recent price-fixing case in the plumbing fixtures industry. This evidence indicates that, in 1960, the FTC issued a price discrimination complaint against a firm that was actually a defecting member of a price fixing conspiracy. The evidence shows that the commission unwittingly enforced the price fixing agreement.

The record in the price fixing case shows that in plumbing fixtures trade association meetings the threat of Federal Trade Commission Robinson-Patman Act action was frequently used to cajole reluctant producers back into the conspiracy.

We understand.

Mr. DINGELL. Would you yield at this point?

Mr. BANTA. Sure.

Mr. DINGELL. This sounds like a great defect in administrative practices inside the agency to me.

Now, I am curious to know if, is there anything inherent in Robinson-Patman that would require the Federal Trade Commission to force reluctant members or former members of price fixing conspiracies back into the conspiracy?

Mr. POTVIN. May I ask a clarifying question, Mr. Chairman?

Mr. DINGELL. Yes, certainly.

Mr. POTVIN. Mr. Banta, were you saying that the PFMA, a trade association, used this to force its members back into line?

Mr. BANTA. There is evidence of that, yes.

Mr. POTVIN. No intention was meant that the Commission did this?

Mr. BANTA. No, no.

Mr. DINGELL. No, but what I am trying to find out is, is there anything in the Robinson-Patman Act or in any of the other statutes of the Federal Trade Commission that would require the Federal Trade Commission to so interpret the Robinson-Patman Act as to force reluctant present or former or past or future conspirators back into some kind of a price-fixing conspiracy?

Mr. BANTA. No; I think price fixing is clearly illegal. I mean I do not—.

Mr. DINGELL. It is clearly illegal and it is clearly illegal even with the presence of Robinson-Patman fully enforced; am I correct in that assumption?

I am setting no trap. I want to know because the function of this hearing is to find out how Robinson-Patman is being enforced. And if they are using Robinson-Patman to force price-fixing conspiracies, then I darned well want to know about it.

Mr. BANTA. I think that the problem is a complex one. I think that in terms of the letter of the law it was proven that the respondent in this case, in fact, violated the letter of the law. Whether or not as a matter of policy, which is a question we are raising, he should have been prosecuted, is another question.

Mr. DINGELL. I am not raising a policy question here at all. I am raising a question very simply put, is there anything in Robinson-Patman that requires the Federal Trade Commission to so interpret that law as to force present, past, or future participants in a price-fixing conspiracy back into that conspiracy or into it ab initio?

Mr. BANTA. The hard question here, of course, is what is meant by competition. This, I think, is precisely—

Mr. DINGELL. You are getting away from my question. Now, I am trying to ask a very simple question.

Mr. BANTA. No: is the answer to your question. I personally believe no.

Mr. DINGELL. Well, is this a question of belief or hope or is it a very simple statement of—is it a very simple statement of fact with regard to law?

Now, you are a lawyer and one of some capability, and I am curious to know whether your interpretation of Robinson-Patman is that the FTC is under the Robinson-Patman compelled to force reluctant former, past, present, or future, participants in a price conspiracy into a conspiracy to fix prices or to restrain trade.

Mr. BANTA. I have always shared Jerome Frank's view that law is a prediction, as predicting what courts—the courts and the commission will do—

Mr. DINGELL. I am not asking you to predict. I am asking what is your interpretation of the law. You studied this law.

Mr. BANTA. My interpretation of the law is, no, they are not required to do it, no.

Mr. DINGELL. No. As a matter of fact, it would be fair for me to make the statement, I think, that that would be a perversion of the purposes of the Robinson-Patman Act. After all, we have a rule of reason which we apply in interpretations of law, and Robinson-Patman is to be interpreted, I think, in a fashion consonant with, absent other circumstances, all of the other antitrust laws, and what you might well call the broad public policy of the United States, which is against price fixing, price fixing conspiracies; am I correct?

Mr. BANTA. That is right, sir.

Mr. DINGELL. So here I think you are discussing with the committee a situation where Robinson-Patman was poorly administered by the agency. Am I correct?

Mr. BANTA. That is correct.

Mr. DINGELL. I do not want you to be hesitant to tell the truth. If anybody gets after you for telling us what you think, they will suffer, I promise you.

Mr. BANTA. Let me say this: We are citing this case to point out what we believe is a real difficulty. All legal elements were proved, and I believe there, in fact, probably was some injury to competition at the retail level in the discrimination in this area.

The problem is that we have a tradeoff between injury to competition at the retail level versus what happens at the producer level.

Mr. DINGELL. Well, is that really true? Don't you find yourself in a situation where the Federal Trade Commission ought to take a look and say, well, now, here we have a price fixing conspiracy—

Mr. BANTA. Yes, but they didn't know that.

Mr. DINGELL (continuing). And rather than applying Robinson-Patman, we are going to apply Sherman or Clayton or turn the matter over to the Department of Justice for proceedings under such statutes as might be under the administration of that agency?

Now, isn't that the way this matter should really be handled?

Mr. BANTA. Yes, sir. We are not implying that the Commission knew there was a price fix here.

Mr. DINGELL. I don't care whether they knew or not. You had here, obviously, a very wrong result. Now, it may be that if they did not know, we ought to take a look and maybe consider some impeachment proceedings—

Mr. BANTA. Let me describe a harder case to you. Let's suppose hypothetically in the plumbing fixtures case—

Mr. DINGELL. No; I want to get right down to a very simple statement of how Robinson-Patman is to be applied because I don't want anybody to walk out of this room with the impression Robinson-Patman was passed to sanctify price fixing or price-fixing agreements because if it is, we had better repeal the whole thing right now. But I don't happen to think it is so and I want to hear your comment.

Mr. BANTA. Yes, sir. Our point is in enforcing it, simply looking at one level of competitive injury one runs a serious risk of causing some harm at another level.

Now, even absent a price fix this could happen.

Mr. DINGELL. Does not this put us at a point where intelligent enforcement and administration of that statute ought to be so carried on that the other vices and abuses about which you—I think you—very properly complain should be avoided?

Mr. BANTA. Yes, sir. I think this is what is required—

Mr. DINGELL. The reason I have been pursuing this particular response is maybe we are going to make comment on this when we file our report with our parent committee.

Mr. BANTA. Yes, sir.

Mr. DINGELL. And if this be so, I intend to have the staff inquire, or, rather, I intend to have the staff inquire as to whether or not this, in fact, be an area that FTC direct its attention to.

Mr. BANTA. We think that the only way this kind of problem can be avoided is by a very, very careful economic analysis.

As I started to say, suppose in this industry there was no price fix at the producer level. Let's suppose we had a tight oligopoly where the price was simply, one had conscious parallelism or some sort of tacit agreement.

Mr. DINGELL. Perhaps when you have that kind of a situation you get price fixing by everybody following a leader.

Mr. BANTA. That is right.

Mr. DINGELL. You do not have to have an active conspiracy. It is sort of a conspiracy in silence.

Mr. BANTA. Right. Now, in that situation where we have no, at least under present law, present law as it is interpreted, any illegal conspiracy, we still may have a, shall we say, net anticompetitive effect if we were to proceed against price discrimination at the retail level. It is a serious risk.

Mr. POTVIN. Mr. Chairman, may I ask a question?

Mr. DINGELL. Sure.

Mr. POTVIN. Let's go back to your basic premise. It happened that the PFMA prosecution came in large part from this committee which asked IRS to look into it. A young agent fresh out of college walked in and bagged their whole set of records and gave them to Justice and off to the wars or to the juries. You start in and you have got a number of manufacturers in a fairly tight oligopoly situation—

Mr. BANTA. Right.

Mr. POTVIN (continuing). With just a classic price fix.

Mr. BANTA. Absolute.

Mr. POTVIN. Now, you said what, that they were keeping some of their people in line by—

Mr. BANTA. What happened is that one of the members of the ring broke ranks. He discriminated. He discriminated in a range of ways, and was ultimately prosecuted by the Commission under 2(a).

Mr. POTVIN. Are you distinguishing here—you are a manufacturer. I am a manufacturer.

Mr. BANTA. Yes.

Mr. POTVIN. We agree to charge the same price.

Mr. BANTA. Right.

Mr. POTVIN. That is price fixing.

Mr. BANTA. Right.

Mr. POTVIN. You charge your customers nondiscriminatorily, not necessarily the same price but—

Mr. BANTA. Right.

Mr. POTVIN. And I do the same but this is not to say that we have to do it at the same price level.

Mr. BANTA. Sure.

Mr. POTVIN. I do not quite see the logical relevance here.

Mr. BANTA. All right. What happens is that one member of the ring rather than cut prices across the board, which would have been immediately detected by all the other members of the ring, started to chisel certain customers. He started to give discriminatory discounts.

Mr. POTVIN. What you are saying is that in addition to being a price fixer, he was also violating the Robinson-Patman law.

Mr. BANTA. That is right.

Mr. POTVIN. And they said they would turn him in for that if he did not come off it.

Mr. BANTA. I do not know whether that happened with regard to him. For some reason or other the Commission did bring a case against them. Presumably someone complained. I think it is generally conceded among economists that when a price discrimination breaks, it will break in a discriminatory manner.

Mr. DINGELL. Well, does not this then leave us an assortment of options and does it not point to the fact that the Commission and the Department of Justice have a whole series of options in carrying out the broad national policy—(1) to go after the discriminations? And I think it would be pretty hard to say this is bad; (2) to go after the conspiracy; (3) to go after the monopolies and restraints of trade, and things of this kind that happen to have existed, and to do any or all of these is not necessarily to say that any of the statutes are bad or are anticompetitive.

Mr. BANTA. I would be inclined to suggest to you—well, if you are going to take the price discrimination aspect of the thing first, the effect is going to be to get the fix going back again.

Mr. DINGELL. Isn't it poor administration to just take one of these and say this is enforcing the law? Shouldn't they go through and make a thorough investigation and come up with an appropriate view of the economic facts?

Mr. BANTA. Yes, sir; absolutely.

Mr. DINGELL. And isn't the situation you are complaining about really a question of poor administration of a series of statutes as opposed to the administration of one bad statute?

Mr. BANTA. I think so. That is a fair characterization.

Mr. DINGELL. That is the impression I get.

Mr. BANTA. Yes.

Mr. DINGELL. And, of course, we are here looking at this, and one of the points I got is the total inadequacy in the amount of the budget being allocated and the fashion in which it is being allocated by the Bureau of the Budget.

Mr. BANTA. We are saying this risk is always run where we do not have economic analysis, careful economic analysis at all levels, when you deal with discrimination.

Mr. WERTHEIMER. On a case-by-case basis?

Mr. BANTA. Yes, I think so.

Mr. DINGELL. I sort of took over from you, Mr. Potvin. I apologize. I hope you will proceed, gentlemen.

Mr. ODEN. Mr. Banta, since you work for the Division of Compliance, it would appear at first notice that it would be even more difficult for you on a case-by-case basis rather than on an industry basis.

Mr. BANTA. Through the Division of Compliance?

Mr. ODEN. That is right.

Mr. BANTA. Well, let me get to our recommendations, then.

Mr. ODEN. I mean the problem is that it would not do any good, and this criticism appears to be widespread, for the Commission to issue thousands and thousands of orders and never any enforcement of them. In the Division of Compliance in your Bureau and in the Bureau of Deceptive Practices, because of the way the Commission goes about picking and choosing cases and prosecuting them, sometimes the division's hands are tied behind its back, so to speak, in carrying out any of these orders.

Mr. BANTA. In selecting a case, I think the people responsible for selecting it, prosecuting it, should beforehand state precisely what it is they expect the order to do in the market and precisely tell us what the effect is going to be and precisely define the remedy. Then I think it becomes an easy matter.

Mr. DINGELL. You know, I am just reminded of the old highwayman case. You remember the highwayman case we had?

Mr. BANTA. No, sir.

Mr. DINGELL. Well, the parties were in litigation in the old courts on a quasi-contract where for services performed in connection with a joint venture one party had agreed to share the fruits of the joint venture with the other, and they proceeded to litigate, and the result of the litigation was that both of the participants were hanged, and the lawyers, I think, were sent to jail. The joint venture was a holdup on the highway. And it kind of sounded to me like what you are talking about here, that your conspiracy is the same kind of an arrangement.

Mr. FIELD. Could I make a comment on this?

We use a conspiracy, a particularly bad example, because we have the evidence, but it is really illustrative of the whole problem of both explicit and implicit price collusion, whether you are talking about a price ring like we have here, an oligopolistic pricing market. When prices fall in these markets they tend to do so discriminatorily at first. When the implicit or explicit fix breaks, it tends to do so in a discriminatory manner.

If you move in at that point and attack the discrimination, you run a very real chance of starting, of putting prices back up where they were in the first place.

Mr. BANTA. By the way, we should distinguish this position from that of the gentleman before us who mentioned that there are a lot of statements around that price discrimination causes prices to fall.

I do not think there is any evidence of that. But when the market forces push prices down, they do tend to fall in a discriminatory manner, either where there is a price fix or a price oligopoly. I think that can be demonstrated.

Mr. POTVIN. All I think you are saying is the big guy gets the low price first.

Mr. BANTA. Absolutely.

Mr. FIELD. And you have got to be very careful in this particular act, particularly since the emphasis in this act is on the low price, and this is the thrust of most of the action.

And the result is that oftentimes we never even look at the cause of the high price. And I think this is very serious psychological problem with regard to the act.

Mr. DINGELL. What you are saying is we have tried to eliminate discriminations with regard to low prices but we have not gone into the question of discriminations on account of high prices.

Mr. FIELD. Not discriminations on the ground of high prices, the source of the market power that allows the company to charge the high price.

Mr. ODEN. Implicit in what you are saying, is that the Robinson-Patman Act would never have to be enforced if the price-fixing divisions of Justice and Federal Trade would do their job, along with the monopolization divisions.

Mr. POTVIN. Gentlemen, let us envision the following tableau in the midthirties. Suppose an archangel someone equally able to make such a statement had stopped our senior majority member, Wright Patman, in the halls on his way over to introduce the act and said, "Mr. Patman, we guarantee you an absolutely homogenous market." If he had believed the archangel, he presumably would have conceded there was no need for the act.

But absent archangels and other heavenly hosts and in the real world we do not have a homogenous market, and even with the great respect we all have for Dick McLaren down in the division, do you really feel that there is a chance of such a thing in our lifetime?

Mr. BANTA. No, of course not.

Mr. POTVIN. It is a goal that we as antitrusters will hopefully continue to strive for.

Mr. BANTA. I think we have to concede again, barring your miracle we are going to have market imperfections even in the best world we envision. And in that kind of situation there is always going to be some sort of price discrimination.

The question that has to be asked is to what extent is it harmful, to what extent can it be effectively stopped, what are the side effects of stopping it.

These are the hard questions.

Mr. FIELD. A whole range of economic issues.

Mr. POTVIN. You have more statement, still, do you not?

Mr. BANTA. Yes. You are going through a lot of it.

Mr. DINGELL. Yes. I think we had better let you go ahead with your statement.

Mr. BANTA. All right.

We would like to draw the committee's attention to a very impressive dissertation done by Dr. Ronald Knutson, of Purdue University. Dr. Knutson did a very elaborate study of the effects of the Minnesota Dairy Industry Unfair Trade Practices Act. This act in many important respects parallels the Robinson-Patman Act.

We are reluctant to summarize Dr. Knutson's conclusions; however, we do want to point out that he found one highly competitive dairy market to be characterized by extensive discriminatory conduct. And

he found evidence that the elimination of such conduct in other markets contributed to a decline of competition and higher prices.

This study is significant in that to our knowledge it is the first full-scale study of the effects of an antidiscrimination law on a particular industry. We believe it raises serious question for public policy.

Another problem we would like to draw the committee's attention to is that assuming a particular act of price discrimination can be identified as anticompetitive, it is relatively easy for particularly large companies to avoid the intent of an order by a number of tactics.

Perhaps most important is the fact that large buyers inducing discriminatory allowances can often sidestep the effect of the order through vertical integration. We feel the Robinson-Patman enforcement is the major cause of vertical integration by retailers into some industries.

Mr. POTVIN. Well, might it not also be said that the failure of the commission to use or attempt to use section 5 in a dual distribution situation, which is what results when they go to vertical integration, has got to be charged with some of that, too?

Mr. BANTA. It may not be a dual distribution system. They just integrate backward vertically for their own benefit.

Mr. POTVIN. Well, and of course this not being illegal —

Mr. DINGELL. Are you saying that this is forced by R-P because of section 2(a); or what are you saying?

Mr. BANTA. Let me describe the situation. We have a large buyer of a very large powerful firm with a deep pocket in terms of access to capital. He induces discriminatory payments or discriminatory prices from his suppliers through one way or the other. If he is prevented from doing this, he may very well just turn around and say I will make it myself, and we think this has happened.

Mr. DINGELL. Is this the only force that would cause him to make this judgment?

Mr. BANTA. I cannot answer that.

Mr. DINGELL. Isn't it often a fact that there are other forces in the marketplace?

Mr. BANTA. I should certainly think so.

Mr. DINGELL. I think we would be hard put to say R-P is the sole cause of this.

Mr. BANTA. We could never prove it.

Mr. DINGELL. Do you have any reason to suspect that R-P would be the sole cause of this kind of —

Mr. BANTA. I think so.

Mr. ODEN. The sole cause?

Mr. BANTA. The sole cause. No. All we can do is suspect it is a factor.

Mr. DINGELL. A factor. A major factor or a lesser factor?

Mr. BANTA. I think it is a major factor in certain industries.

Mr. POTVIN. Mr. Chairman, I think what you are really describing is the other side of the coin that we had on the podium quite a bit during the hearings.

I think now of Congressman John Moss' hometown, Sacramento, in which we heard that a chainstore said to a baker, "Look, Charley, 3 cents off for us or we build our own bakery."

This is the way arm twisting is done.

Mr. BANTA. Baking is one we had in mind.

Mr. POTVIN. So you are talking about the other side of that coin.

Mr. BANTA. Yes.

Mr. POTVIN. You are saying if they were free to give price discrimination then perhaps they would have slipped them the 3 cents and not built the bakery, but that is sort of—you would have to choose between two pretty rotten worlds.

Mr. BANTA. One sided. I mean, I am inclined to think that what we have got here is a tradeoff between two bad things, which is the hard issue.

Mr. DINGELL. Isn't this kind of economic banditry violative of other sections of the antitrust laws?

Mr. FIELD. If the retailer possessed the market power in the industry in which he sells, certainly there would be—there could be an attack under other sections—

Mr. DINGELL. Could be attacked under other sections. We might even conceivably wind up with a monopoly—conceivably as a conspiracy.

Mr. BANTA. I do not see a conspiracy. I could see a straight monopoly situation.

Mr. DINGELL. And it might also be attacked tending toward monopoly.

Mr. BANTA. That is right. It could very well be.

Mr. DINGELL. And if you have got people sitting down saying this is what we are going to do, saying we are going to charge this or that, you are pretty close to a conspiracy.

Mr. BANTA. You may run into a really tough situation where the large buyer is confronted with either a tight oligopoly or an outright price fix and in frustration he says, "To hell with you; I will build my own."

Do we want to accuse him of violating the other antitrust laws?

Mr. DINGELL. He may not be. And again, this might be an economic judgment that he would have a perfect right to make. And I am not sure that we should castigate him where he makes that judgment, based solely on economic reasons.

Mr. BANTA. True.

Mr. DINGELL. And, of course, if you are going to consider R-P fairly, should you not consider it as part of the whole body of antitrust law and not say it is going to cause this bad result when there are other sections of R-P that deal quite clearly with other sections, rather with other anticompetitive or monopolistic practices in industry?

Mr. BANTA. We would hope they would have been enforced that way.

Mr. DINGELL. This gets us back again to a question of enforcement within the Department of Justice and by the Commission. And, of course, I must tell you in perfect fairness that my experience in Congress both on this committee and other committees has led me to the rather happy conclusion that FTC is one of the few independent agencies in this town that is actually trying.

You can take that as a compliment or not.

And I tend to look quite often at—I recognize they have defects, but I try to look for the fundamental reasons. I do not like to just hack at branches of the tree. I like to cut at its taproots. And, of course,

I keep coming back to the fact that the agency does not have the funds and ability to do the real thing it is charged by law with doing. And when I come to that situation I have got my villain sitting before me, and that is not the Federal Trade Commission. That is the Bureau of the Budget.

Mr. BANTA. Lest we be misunderstood, we do not advocate, nor does the evidence suggest, the abandonment of all regulation in the price discrimination area. What we do feel is that the present high level of Commission resources devoted to this area, approximately 50 percent of its antimonopoly resources, have a low-payoff relative to alternative uses, particularly mergers and antimonopoly causes.

We would like to direct this committee's attention to the recent statement of the Chairman of the FTC before the Antitrust and Monopoly Subcommittee of the Senate discussing the current merger problem in America and to the more expanded analysis of the problem in the FTC staff report on corporate mergers released by the Commission in November of last year. Dr. Willard F. Mueller, the former Chief Economist of the FTC and Director of its Bureau of Economics, has estimated that as few as 20 merger cases a year could halt the immense anticompetitive effects of this movement.

It was difficult to draw definite conclusions from our evaluation of the Commission's Robinson-Patman enforcement efforts because of the lack of necessary economic data.

However, our belief is that if data were available they would show that some Commission orders were anticompetitive, most probably had little or no effect on competition and some would have been procompetitive.

Obviously, from all we have been saying, we strongly support further study in this area. We think there is a need for more adequate theory and better data.

We believe that either the Commission or perhaps this committee should sponsor a study which would develop economic criteria for selecting Robinson-Patman Act cases. Such criteria should take into account alternative uses of the Commission's enforcement resources, the probably competitive consequence of the case, and the probability of effective relief. Such criteria should be used to maximize the value of the Commission's antimonopoly activity to the consuming public.

In our view, such a study could best be conducted by a prominent industrial organization economist.

Since such a study may take considerable time, there is need for an interim policy. In the interim, we suggest that each proposed price discrimination be reviewed by the Bureau of Economics at least before complaint. And complaint should be accompanied by a statement as to probable competitive consequences on both prices and on dimensions of industry structure. Each proposed complaint should be accompanied by a statement of the probable effectiveness of the proposed remedy.

We conclude that regulation of conduct, and specifically price discrimination conduct, is a difficult and hazardous undertaking.

In general, we feel that it requires more antitrust resources, that enforcement is considerably slower, and finally that it involves a considerable risk of being ineffective, if not harmful, to pursue price discrimination cases rather than other types of antitrust cases, par-

ticularly mergers and monopoly cases which directly affect market structures.

Mr. DINGELL. Now, let me ask one question here so we have this in perspective.

Mr. BANTA. Yes.

Mr. DINGELL. I am very jealous, as I suspect you know, of the prerogative of Congress, and I just want to be very clear, you are not suggesting that the Federal Trade Commission in your last few words, should engage in a picking and choosing of congressional policies which it would carry out, without some actual statutory change by the Congress, are you?

Mr. BANTA. I think yes. I think we are. I mean, to be perfectly candid—

Mr. DINGELL. Let me make it very clear that as long as I sit in this seat, that policy is not going to be carried out.

Mr. BANTA. I have to concede your position as consistent because of your emphasis on budgetary limitations. Given budgetary limitations, I think we can pick and choose. The cold fact is we do pick and choose. We simply do not bring all the merger cases we could bring. I think every enforcement agency, even the Metropolitan Police Department does not investigate every felony they ought to investigate.

Mr. DINGELL. Alas, this is true.

Mr. BANTA. Right. We pick and choose, and we might as well admit we pick and choose, and I think we have to set standards and priorities for picking and choosing. And I think we have to pick and choose based on the benefit to the public.

We have to sit down and say, what is going to help everybody first. We have got to look at the impact on—well, rank our cases according to the impact they are going to have on the public as a whole, and weigh them and measure them and take them in the order in which they come.

Mr. DINGELL. Of course, did you not point out in your comments a little earlier that where what is really needed with regard to Robinson-Patman cases is a more thorough review really in relation to the other antitrust laws?

Mr. BANTA. Surely.

Mr. DINGELL. Wasn't that what you said?

Mr. BANTA. Yes. That is a fair—

Mr. DINGELL. And if you do this carefully and officially, are you not going to come up with the result that you desire?

Mr. BANTA. True. Absolutely.

Mr. DINGELL. Now, you did make one suggestion a little earlier to the committee that I must tell you impressed me, and that was the suggestion that really essentially the Commission could function more efficiently, and I think this is one of the things the committee is looking for, is suggestions as to how the Commission may best use and allocate that, unfortunately too slender resource that is afforded it by the Bureau of the Budget and the Congress.

Proceed.

Mr. BANTA. We feel that the twin problems of existing concentration and mergers are the principal threats to the free market system and are the primary causes of what Ralph Nader estimates to be a

\$120 billion loss to the consumer due to monopoly. We, therefore, recommend that the Commission shift the bulk of its Robinson-Patman resources into its antimerger and antimonopoly activities.

Mr. DINGELL. Now, that is a statement—

Mr. BANTA. I did not think you would like that.

Mr. DINGELL. Yes. That is susceptible to several meanings.

Would you like to tell us just what bulk you propose to have shifted and what it means in terms of implementing the policies of the Congress with regard to Robinson-Patman?

Mr. BANTA. Right. I think that even knowing what we now know, and granted we need to know a lot more, I think the immediate return from our antimerger cases, as we noted before, would be immense. Dr. Mueller said 20 cases would stop the anticompetitive effects. And I do not anticipate they would be easy cases.

I think we could stop the merger activity, however.

Mr. DINGELL. You say we could or could not?

Mr. BANTA. We could.

Mr. DINGELL. I think you are getting us down to the point that we ought to start with some vigor asking for additional funds for FTC to do what is needed in terms of stopping the mergers.

Mr. WERTHEIMER. Isn't that the alternative to your suggestion, providing greater funds?

Mr. BANTA. Obviously, the degree of carefulness with which we would have to assign our priorities would be—or let me put it this way: We would be able to get a little further down on our list of priorities if we had a little more money.

Mr. POTVIN. Let's say that 20 merger cases were filed next Tuesday, bright, shining, new cogent complaints and pushed how long, oh, Lord, how long, until you get judgments—5 years?

Mr. BANTA. Absolutely.

Mr. POTVIN. Seven years?

Mr. BANTA. Yes, at best.

Mr. POTVIN. All right. Now, I want you to turn to your left, sir, and I want you to face that gentleman right there, Henry Bison, who is in this room representing, I guess, 10,000 small businessmen.

Is that a reasonable estimate, sir?

Now, these are little guys. They are fragile. What is going to happen to them during this 5 to 7 years situation? You have just scratched out your entire incipency enforcement. You are going to go for the jugular. Now what are you going to do about helping some of his people stay alive during the interim?

Mr. BANTA. If we don't go for the jugular, there isn't going to be anything left of him anyway.

Mr. POTVIN. I am not suggesting you should not go for the jugular. I am simply questioning the wisdom of the exclusivity of that option.

Mr. BANTA. All we are saying is if we have the resources left over after doing what we absolutely have to right now, then we will get to him. But I do not think we can get to him to the prejudice of this other thing and which the survival of our system requires.

Mr. DINGELL. I am rather curious. If you were to take the entire Robinson-Patman enforcement and put it into antimerger cases, how many antimerger cases could you begin at FTC?

Mr. FIELD. Well—

Mr. DINGELL. Would it be 20?

Mr. FIELD. The last figures I have seen were that there are approximately 30 attorneys in the Discriminatory Practices Division. This was back in June, I believe. And my friends in the General Trade Restraints area tell me about half of their 30 attorneys also deal with price discrimination type cases. So we are talking about 45 trial attorneys.

Mr. DINGELL. And about a commensurate number of supporting people?

Mr. FIELD. Supporting people. That is right. That is about half of the total number of the trial attorneys in the Bureau of Restraint of Trade.

Mr. DINGELL. Are you saying, then, that you could double the effort in merger cases if you were to—is that the statement you are giving us?

Mr. FIELD. That would be about right. That is about the way the figures come out.

Mr. DINGELL. All right. Now, how many cases do they bring in the merger end of the FTC in the course of a year?

Mr. BANTA. It would be a guess.

Mr. FIELD. It would be a guess.

Mr. DINGELL. Well, your best guess. We will follow these questions up with the FTC. And I do not intend to browbeat you for the answers that you give. I think your comments here are very helpful.

Mr. FIELD. With an additional 30 attorneys—gee, I don't know. I guess 15 cases, I would think. I do not know.

I am not really familiar with the manning requirements of the trial divisions as far as the ratio of cases to attorneys so I really cannot say.

Mr. DINGELL. You would say—I would have the feeling that depending on the size of them, it would be one, two, or three. That is the recollection I have from days when I was practicing law with Government attorneys dealing with antitrust matters. A lot of times you use one, sometimes two. Every once in a while you have three and possibly four, but rarely more than this.

Mr. FIELD. That is correct.

Mr. DINGELL. Although a private law firm would sick a dozen people on the same size of lawsuit.

Doesn't this say, then, if you are talking about this level of enforcement, doesn't it say that you have a gross inadequacy of endeavor in the field of antimerger work in the FTC?

Mr. BANTA. And antimonopoly, too, I believe.

Mr. DINGELL. And antimonopoly.

Mr. BANTA. I really think we have to reach an existing concentration, too, which is a big part of the gentleman's problem over there.

Mr. DINGELL. Of course, given a circumstance here, don't our friends in the small business community find themselves in a very ugly situation that they are going to die one way or another but they are going to probably breathe just a little longer if they keep on having the Robinson-Patman Act to help them, because it gets at abuses just a little quicker?

Mr. BANTA. Well, what Mr. Potvin said about the merger cases taking 5 to 7 years can very well be applied to the Robinson-Patman Act cases.

Mr. DINGELL. Yes, but a lot of times they do not go that far, do they?

Mr. BANTA. I have to concede that the overwhelming majority are consents.

Mr. DINGELL. A lot of times the rascal gets scared off at an early stage in the proceeding, isn't that a fact?

Mr. BANTA. Surely.

Mr. DINGELL. So don't we really have here a situation where the little guy might live long enough to get bought out by the oligopolist instead of being killed by price discrimination?

We are looking at the blackest possible picture we can paint this morning, and I am just trying to put a little light into this.

Isn't that really the situation, that they just breathe long enough to sell out instead of getting killed off by discrimination?

Mr. BANTA. You have to understand that, at least it is our view that we really have not been doing him that much good anyhow.

Mr. DINGELL. Well, he has that unfortunate illusion that you have been helping him.

Mr. WERTHEIMER. Mr. Chairman, could I ask a question on that point?

Mr. DINGELL. Certainly. Mr. Wertheimer.

Mr. WERTHEIMER. You have a couple of statements in your conclusions relating directly to this colloquy that has just taken place. Your second conclusion is, "There presently are no available empirical data, nor is there even a theoretical framework, that would enable us to clearly judge the effectiveness of the Commission's Robinson-Patman Act activities."

And in your fourth conclusion you say:

"At the present time we do not possess either the empirical or theoretical data necessary to enable us to determine whether a particular price discrimination is in fact likely to be procompetitive, anticompetitive, or neutral in its effects."

Mr. BANTA. Yes.

Mr. WERTHEIMER. Doesn't it then become critical, in terms of your approach to the future of the Robinson-Patman Act, that a data study take place, and isn't that a basic prerequisite to any conclusions you feel should be reached about the future of the Robinson-Patman Act?

Mr. BANTA. Absolutely. We have to concede that a great deal of what—well, the overwhelming majority of what is said, including what we say, is speculative. I mean, we are not—

Mr. WERTHEIMER. Well, we have had witnesses on both sides of this argument and, all seem to concede the lack of an empirical data base.

Mr. BANTA. It is the ignorant talking at the ignorant, is what it comes to.

Mr. WERTHEIMER. The ABA recommended an FTC study to deal with these problems. What is your feeling about this?

Mr. BANTA. I do not have any—I think the crucial thing is it be headed by a man of confidence and integrity.

Mr. WERTHEIMER. Should it be an economist?

Mr. BANTA. Oh, definitely.

Mr. POTVIN. From your suggestion today, I gather you think it should be done without rather than within the agency, and, second, that it should be certainly economic rather than legal in nature.

Mr. BANTA. Yes, I think there is a lot to be said for the study being from without the agency. There is an enormous allotment of capital disseminated from within the agency, and I think a person doing it from within the agency would be subjected, not consciously, subconsciously to a lot of pressures that he could do without.

Mr. WERTHEIMER. The study we are talking about now is a completely different kind of study than the kinds of presidential task forces that have gone on in the past. Those are opinions you believe which lack basic empirical data to reach any solid conclusions.

Mr. BANTA. We were particularly disturbed by the Neal report which I think both of us consider to be one of the most brilliant documents ever written on antitrust, a fantastic work, until you get to the price discrimination area where I think they just make statements that are—well, we have to concede we may be somewhat sympathetic to it, but there is no data to support it.

Mr. WERTHEIMER. No backup, basically.

Mr. BANTA. Not at all. I remember the statement in there that most price discrimination is procompetitive.

Mr. ODEN. Mr. Chairman, there has been some discussion about the Federal Trade Commission and its budget. It is interesting to note that in the Federal Trade Commission's budgetary request of Congress for fiscal year 1971, the Bureau of Restraint of Trade of the Commission is asking for an increase of four attorneys at a cost of \$84,000, two of which go in the Office of the Director and two in the Division of Mergers.

Also, within their budgetary request they show that as of fiscal year 1969, they had complaints issued which were pending at the beginning of the year, seven; approved for negotiation or reopened, 14; dispositions by consent, six; disposition by consent litigation, seven, and pending at the end of the year, eight. And as far as litigating cases, they had pending at the beginning of the year, 11; complaints issued or reopened, eight; docketed orders issued, seven; pending at the end of the year, 12.

Of course, fiscal year 1970 has not ended yet.

Then in the Division of Discriminatory Practices, complaints issued during fiscal year 1969, there were pending at the beginning of the year, 13; approved for negotiation, eight; dispositions by consent, 10; dispositions by litigation, two; pending at the end of the year, nine.

Now, litigated cases, pending beginning of year, 1969, four; complaints issued or reopened, two; docketed orders issued, one; and pending end of the year, five.

So I think the Commission's own budgetary request speaks for itself as far as enforcement of both mergers and Robinson-Patman.

Mr. WERTHEIMER. Mr. Chairman.

When you talked about increased manpower in order to accomplish your recommendation, you were talking about more than just increased manpower weren't you? You were also talking about change in approach and attitude—

Mr. BANTA. Yes, I think so.

Mr. WERTHEIMER. Which would have to accompany this if you were going to accomplish what you are talking about?

Mr. BANTA. I think there has to be an increase in the awareness of what each case, its impact has on the total public, on the whole of the economy, and I think that we have to start going after those things that really count.

Mr. WERTHEIMER. Then you would think the FTC has to undertake a much more aggressive antimerger approach than they have taken in the past?

Mr. BANTA. And antimonopolization.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. First of all, gentlemen, isn't it rather pathetically clear that the fact that we can sit here for something approximating over half an hour over shifting a platoon, if you will, from one sector to another clearly demonstrates the just awful understaffing that you people have? We are talking about a society of 200 million people. Frequently in just one of these merger cases you are talking about assets involving billions of dollars, in all 50 States, worldwide, a medium size Wall Street firm that would throw more lawyers into it than you have in one of your entire divisions down there for 5 or 7 years. Isn't that the truth of the matter that rather than haggling over whether it should be here or there, what you need is a new battalion in each sector?

Mr. BANTA. We wouldn't turn it down.

Mr. DINGELL. It strikes me that we are discussing here really a sharing of the poverty rather than adequate resources being put into the field to carry out the congressional intent.

Mr. WERTHEIMER. This applies to the consumer aspects of the FTC also, does it not—this same argument about lack of resources?

Mr. BANTA. Yes. And the need for priorities.

Mr. DINGELL. Well, I thoroughly agree, and this is one of the things this committee intends to address itself to, just where the priorities are and what is being done. But I have come to the hard conclusion, after sitting in this chair for many days and listening to witnesses, that you can take any system of priorities that anybody at FTC or the ABA or Bureau of the Budget established on the allocation of present resources at the agency and you would not have enough in any of the places which need it to really solve the problems that the agency faces.

Now, am I correct in that assumption, or not?

Incidentally, I hope you feel this is a friendly hearing, because it is intended to be. We want to get to the bottom of these problems.

Mr. BANTA. I think so. But I think it should not be overlooked that we can do more with what we have.

Mr. DINGELL. I would not be surprised. Now, wouldn't it be fair to say, though, that one of the bases of achieving that great goal is not just the question of where we are going to put resources but bringing about some honest procedural reform in the agency so that fat cat Wall Street law firms and violators of the antitrust laws of different kinds are not going to be able to literally motion and procedure the agency to death? Isn't that a key to the problem that exists inside the agency as much as the other things we have been discussing?

Mr. BANTA. I think the procedural delay is clearly a serious problem.

Mr. DINGELL. It is not a serious problem. It probably is grinding the Federal regulatory structure to a halt. Is not this one of the great problems we have in this Nation?

Mr. BANTA. There is no doubt about that.

Mr. DINGELL. And it is true whether you are talking about it being done before the FTC, or the FCC, or the FPC, or the ICC, or any other agency. The main function of the ICC is to grind cases very small so that nothing will ever come of a rate increase. The citizen at large never has the resources or the knowledge or the representation here in Washington to attend to that kind of a chore. Am I not correct?

Mr. BANTA. I think so. Apropos of this, somebody told me this the other day, the judgment in the Utah Pie still has not come down so there may not be too much hope for the private remedy either.

Mr. POTVIN. First of all, gentlemen, let me say you are friends of antitrust, which cannot always be said of all who have appeared opposing this or that aspect of Robinson-Patman. Then, too, there is a brash quality of your paper that I personally find engaging. How else to characterize a paper which in one footnote summarily disposes of the entire concept of countervailing power.

Now, one thing you say, gentlemen, is that if price discrimination can hurt a person, he is already so bad off there is no hope for him anyway. I am paraphrasing.

Well, now, bearing in mind that we do not have an atomistic or homogenized economy, isn't that going a bit far, really?

Mr. BANTA. No. Essentially, what we were saying was that if—basically, what we were trying to get at is the situation of a small buyer who is supplied by a wide range of suppliers. If one of them is discriminating against him, it is because he is already in a situation that; in a disadvantageous situation. Otherwise, they would not be discriminating against him.

Now, to eliminate that discrimination by one seller may not accomplish anything at all. Otherwise that one seller would no longer be discriminating against him.

Mr. POTVIN. But aren't you rather ignoring the converse of that, though—you are all right if Morton Salt charges you a penny more for that salt, but if they hit you on peaches, apricots, and on baking soda, ad infinitum, as is said, you are dead.

Mr. BANTA. Period.

Mr. POTVIN. So it seems to me it is perhaps a little simplistic.

Now, let me compliment you on something you have done. It seems to me that you have done a simply superb job in depicting the sort of phony differential caused by massive television advertising. Professor Jones, when he was here, told us that their task force has not considered it and certainly this is a notable contribution you have made.

It seems to me, though, that you have not taken full advantage of your accomplishment in this sense, that you make the statement that if and only if I cannot get the same product at a lower price can you discriminate against me.

Limiting it just now to imperfect competition and advertiser-induced unjustified product differential, does that hold if we have mas-

sive advertising convincing people that Winston really does taste better—

Mr. BANTA. I see what you are getting at. Yes, absolutely. There are a number of industries where there is a market leader whose product is, in fact, absolutely necessary to the—well, in grocery retailing—

Mr. POTVIN. As a practical matter, a grocery store has got to stock Winston cigarettes; right?

Mr. BANTA. Right. It has no choice. And what's his name, Kahn's article some years ago dealing with the A. & P. situation pointed out that in fact A. & P. was never able to get a discriminatory allowance from the cigarette companies because the cigarette companies had created such an advertising acceptance for their brand, such product differential—

Mr. DINGELL. They, we are told, are diligently and actively engaged in fixing the prices of their cigarettes.

Now, I wonder if this does not present antitrust problems, because they prevent that desirable price flexibility which might flow from the big ones being able to get rebates and things under the table. Doesn't this strike you as the reverse of some of the logic we have been hearing in this place?

Mr. BANTA. Yes. It can be a problem.

Mr. FIELD. This is the other end of the story.

Mr. DINGELL. By the way, this particular problem of the cigarette pricing is a matter that this committee intends to look into at a time later.

Mr. POTVIN. One of the other statements you made, gentlemen, is that you are looking just at the structural aspects.

Mr. BANTA. Yes.

Mr. POTVIN. I am perhaps oversimplifying.

Mr. BANTA. No, that is literally true. That is literally true.

Mr. POTVIN. All right. Now, in a society where we do have some per se situations, boycott—

Mr. BANTA. Yes.

Mr. POTVIN (continuing). Price fix—

Mr. BANTA. Yes.

Mr. POTVIN (continuing). Let alone 2(d) and (e), you are not really saying that there are not some courses of human conduct within antitrust that are so inherently reprehensible that they should not be treated as per se violations, are you?

Mr. BANTA. No, absolutely not. All we are saying is that—well, price fixing is a clear example.

Mr. FIELD. Exclusive dealing.

Mr. BANTA. Exclusive dealing may very well be an area—

Mr. FIELD. Excessive advertising, patent abuse. These are all things that we very definitely think should be attacked.

Mr. POTVIN. So you would concede, then, that apart from structural characteristics there are indeed some behavioral aspects that must be attacked?

Mr. BANTA. Yes, but what has to be recognized is that when you get into the conduct ball park you are in an entirely different kind of arena. What we know about cause and effect relating conduct to

structure and performance is a lot less than what we know when we relate structure to performance.

Mr. POTVIN. Indeed. But now there are a number of ways that this type of conduct emerges, some through the decisions of the court.

Mr. BANTA. Right.

Mr. POTVIN. And another, I submit, is by legislative action by the Congress.

Mr. BANTA. True. True.

Mr. POTVIN. When the Congress says this is going to be per se prohibited conduct, then it is your job to enforce it, isn't it?

Mr. BANTA. That is right. In the conduct area we might not—the Cabinet Committee Report on Price Stability argued that concentration in the consumer goods area can be, the rise in concentration in the consumer goods area can be to a great extent attributed to more advertising.

Mr. POTVIN. Well, it seems to me, gentlemen, in closing simply that you and the subcommittee are by no means in disagreement that something must be done about concentration, and soon. And when it is the consumers are going to be the ultimate beneficiaries.

That is all I have, Mr. Chairman.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Chairman.

The committee in examining the Robinson-Patman Act must of necessity also examine the Federal Trade Commission itself, since they are the sole enforcers considering the fact that the Department of Justice does not seem to recognize their responsibility in this area. I wonder if we could just discuss for a second, that is, if you are willing, some of the broad problems of the Federal Trade Commission, particularly among the staff. There have been statements made about the demoralization of the staff, the problems between the younger attorneys on the staff of the Federal Trade Commission and the more or less regimented ways of commission process. And I wonder if either one of you would care to address yourselves to this, since we will have the Commissioners here later this week.

Mr. DINGELL. Let me say this: We will inquire of the Commissioners about these matters regardless of whether or not you make a comment on this. The Chair is not going to force any comments out of you, gentlemen. You may give such answers as you feel are appropriate under all circumstances.

Mr. BANTA. I will let you talk about that.

Mr. FIELD. I think speaking of staff morale, one of the basic problems is the selection of priorities. I think the staff at the commission, certainly impressive to me, most of the younger staff, most of the staff in general, are—have a very high degree of integrity and dedication to the job. But the commission I think has failed to sit down and say this commission is going to prosecute those cases which will give maximum benefit to the consumer, which will lower prices to the consumer, that this is the way we will select cases and that this is—

Mr. BANTA. Could I add something?

Mr. DINGELL. Before you finish, let me say this:

It occurs to me that we had better take a look at some of the congressional direction to the commission with regard to the establishment of its priorities.

Now, Mr. Banta, I did not mean to interject. You had a comment. But I just would like to hear you address yourself to this, because maybe we had better take a look at what Congress has done in this area. I am sure they have said that Congress expects the FTC is going to fix the lowest level of prices for consumers.

Maybe they said other things. I do not know. How would this jibe with congressional will and wish and intent?

Mr. FIELD. That is a good question. There is some—for example, in the history of the FTC Act there is some indication that, in fact, the desire of the Congress was to protect a small businessman without regard to efficiency or prices, and so forth.

I think that that, frankly, is fairly well outdated. I think both small businessmen and the consumers, small businessmen as consumers would benefit from a system of priorities which was set up based, you know, on you might call it the consumer dollar index, you know, the maximum consumer dollars per hour of commission time; in other words, the creation of a competitive economy, creation and maintenance of a competitive economy.

Mr. BANTA. Somebody pointed out the other day that measuring the consumer benefits is a very interesting thing for the small businessman in the sense that he is a buyer, he buys things, too, not just as a consumer but as a businessman.

Mr. FIELD. I think there is a fairly widespread belief that the—this is a hard thing to say, but that protecting small businessmen without regard to the effect upon the general economy is the type of direction that the commission has received from the Congress.

Mr. ODEN. I am not sure whether I was particularly clear in my question. The Nader report, and other critics, including members of the commission, have stated that one of the prime problems in the commission trying to fulfill its statutory obligations is the fact that the staff, itself, seems to be at a loss as to—

Mr. BANTA. Let me describe an experience.

About a year ago we decided to put together a little informal organization of employees, and we were wondering what direction and what thrust it all should take, so we went around and talked to, you know, younger people, and I can't tell you how many, you know, maybe 10, maybe 20, maybe 30, and it was surprising that the concern was not the relationships with their superiors, which was interestingly, remarkably good. There was very little discontent with regard to working conditions, with regard to nitpicking supervision, that sort of thing.

There was a general feeling that what they were doing wasn't important. I would say if I had to put my finger on the single thing that would make a young attorney dissatisfied—I have talked to countless people our age who have left—the general feeling was that what they were doing just wasn't important. And I think that is kind of a difficult thing for a person to live with.

Mr. FIELD. I think also that what they are doing is not important. Lawyers do a lot of things that have no overall importance, but it is not important with relationship to authority and the scope of operation of the Commission itself. It is not what they actually do, but it is what they could be doing that is so discouraging.

Mr. ODEN. If you don't feel you should answer this question, please be free to say so.

Would this be because of a lack of direction from the Commission itself or from, say, the intermediate staff?

Mr. BANTA. That is an easy thing to say, and you know I suppose you could even make a case that it is true, but I think when you really, you know, cut underneath it to a certain extent there is a lack of direction from Congress, there is a lack of direction from the Executive and to a large extent there is an ambivalent feeling in the public at large about the problems of monopoly, about the problems of consumer protection, you know, the shadow of John Kenneth Galbraith has fallen across this whole area with terrifying effect. You know, it is easy to single out blame, but I think what we need, you know, is not just the Commission but Congress, the Nation—we have to look at the whole industrial organizational system and come up with what we ought to be doing before, you know, a serf at the Federal Trade Commission can feel that he has a sense of direction.

Mr. DINGELL. Isn't this a problem throughout Government?

Mr. BANTA. Oh, yes.

Mr. FIELD. There is a review of a book I just read in the Washington Post last week, by a State Department man—what was the name of that? But it dealt with the same type of problems, the fact that the staff always feels that, well, somebody else sets policy and I don't question the policy, and they send it, they direct all of their action and all of their reports within this framework, and then when it gets up to the top, the man who has the authority to set policy, or at least to try to do something about it, he says, well, if everybody else agrees with this policy, it must be right.

Mr. BANTA. There is the beautiful expression. He referred to it as a rolling commitment.

"High on Foggy Bottom" is the name of the book.

Mr. FIELD. "High on Foggy Bottom."

Mr. ODEN. This is interesting, though, because if you look at the legislative history of the creation of the Federal Trade Commission, it was created to fulfill a void that you are saying that the Commission sees in Government and in the population, that it was designed to create direction for the Government moving in on anti-trust problems and moving in on consumer problems.

Mr. BANTA. I think there is very little more inspiring reading than reading what Brandeis and Wilson had in mind when they founded the Federal Trade Commission, when they proposed it to Congress. I think they envisioned it as an agency which would overlook the whole problem of monopoly and industrial organization and consumer protection, and to formulate and devise remedies that were necessary to solve the problems. I think section 5 of the Federal Trade Commission Act can be read to encompass a fantastic range of problems.

Mr. FIELD. I think if the Congress were to give, were to give the commission a direction that the time has come to stop the merger wave and to attack existing concentration, I think the commissioners would proceed fairly rapidly down that road.

Mr. DINGELL. Well, we intend to have an exploration of mutual views, and of course I think you can understand from our discussion

this morning that the Chair and very valuable members of the staff of this particular subcommittee have some very strong feelings on this.

I think we intend to share these views quite forcefully with the commissioners when they are before us at a time not long hence.

Gentlemen, we thank you. It has been a privilege and a pleasure to have you before us.

We are not altogether in entire agreement with you, but there have been few witnesses who have been before this committee with whom we have found ourselves in entire agreement. I am sure you can understand that we appreciate your frank and candid discussion before the committee, and we are grateful that you could be with us.

Mr. BANTA. Thank you, sir.

Mr. FIELD. Thank you.

Mr. DINGELL. If there is no further business before the subcommittee, the subcommittee will stand adjourned until 2 o'clock this afternoon.

(Thereupon, at 12:55 p.m. a recess was taken in the hearing, to reconvene at 2 p.m. this same day.)

AFTERNOON SESSION

Mr. SMITH (presiding). The meeting will come to order. Our first witness this afternoon is Mr. Gericke. Come forward, please.

Would you go ahead and identify yourself for the record and make such statements as you care to.

TESTIMONY OF JOSEPH J. GERCKE, CHIEF, DIVISION OF COMPLIANCE, FEDERAL TRADE COMMISSION

Mr. GERCKE. Gentlemen, my name is Joseph Gericke. I am Chief of the Compliance Division, Bureau of Restraint of Trade, Federal Trade Commission.

I did not come up with any prepared statement today. It was my understanding that perhaps the committee would want to ask questions of me. So—

Mr. SMITH. I will ask counsel to proceed at this time.

Mr. POTVIN. Mr. Chairman. Mr. Gericke, you were present this morning, I suspect, when Mr. Field and Mr. Banta placed in the record and discussed their paper.

Mr. GERCKE. Yes; I was.

Mr. POTVIN. And it was as to the issues contained in that paper, to the degree you consider it appropriate that we were hoping we could get some comment from you and beyond that anything you would care to say for the subcommittee's benefit on compliance generally and Robinson-Patman compliance specifically would be helpful.

Mr. GERCKE. With respect to the Banta and Field report, I of course did not read that report before it was circulated and it was published and it does not reflect official views of the compliance division. The problem with the report if one reads it closely is that it doesn't say anything, because I think that the hallmark of it is contained in the statement—"there presently are no available empirical data nor is there even a theoretical framework that would enable us

to clearly judge the effectiveness of the Commission's Robinson-Patman activities." Now, I think that statement characterizes this report.

From an objective standpoint, there are approximately 1,000 Robinson-Patman orders. Don't hold me to the number, but about that. In almost every one of those instances, a compliance report was ultimately approved by the Commission which minimally reflected the fact that the pricing or distribution programs that had been questioned in the complaint were eliminated. Now, the Robinson-Patman Act is not a statute designed to reach questions of basic concentration. It is a method statute and Congress in its wisdom thought that because of the employment of devices singled out as methods of bringing about the reasonable possibility of injury to competition, as for example, in the instance of 2(a), that it was feasible and desirable to specially treat those methods in the Robinson-Patman Act. So that if one would approach the act by viewing it as a method statute and but one of the several statutes that comprise the antitrust arsenal, it has a very definite place. It is not a panacea for all the ills besetting the economy.

There were some questions this morning by Chairman Dingell to the effect that perhaps there was an inconsistency between the Robinson-Patman Act and price-fixing approaches—both under the Sherman Act and the Commission Act. In my experience, and I have handled many, many cases of each nature both from the trial as well as appellate end, and one illustration; for example, I prepared a brief in the *National Lead* case before the seventh circuit. You had a situation where there were multiple price systems conspiratorially arrived at and utilized for a variety of products but inherently in the fix was also an agreement to discriminate in price in favor of the power buyers on each particular product line. For example, on lead oxides, the big battery manufacturers would get the preferred price. On dry white lead it was the big paint manufacturer. Now, these price discriminations were inherent in the conspiratorial system and therefore there was nothing in consistent as the courts ultimately found in dovetailing those theories. Now, I can see an instance also, and I think it is a question of planning, where on a daily basis we ask ourselves the question: "If we get a complaint of a price war are we going out under Robinson-Patman and resolidify a fix?" And it is a question as to whether it is desirable at times to even investigate situations of this nature, and of course they occur most frequently in the gasoline areas.

My initial interest in having Mr. Banta and Mr. Field pursue the area of compliance was to really get an objective look at where we had gone and where the shots hit so to speak. So I was primarily interested in that, and I think from the standpoint of the report reflecting the sections of the statute that were involved it has some benefit. Beyond that, I can't commend it as being a very academic or scholarly approach to very complex problems. There is very definitely a place for the Robinson-Patman Act. I can look back on the Commission's administration of the statue and criticize the approach as an administrative matter on some of the cases. Those mistakes are going to be found, shouldn't be tolerated but they are going to be found in the approach to any statutory enforcement system.

I don't have really anything more by way of general observation. I would be most happy to try to answer any questions.

Mr. POTVIN. Well, sir, in addition to Robinson-Patman matters, now, what other sections does the compliance office entail?

Mr. GERCKE. I have in effect all orders of an antitrust or a restraint of trade nature. At the present time I have 70 some divestiture orders, not literally divestiture but in the area of section 7. Some of them would have moratorium provisions against future acquisitions. Others would require divestiture. I have all of the price fix orders or any type of restraint of trade or antitrust order that had genesis in section 5 of the Commission Act. So as to the range of type of practice—there would be conspiratorial price fix, boycotts, orders of the nature of that issued not too long ago against Luria Steel, which I think is a most interesting situation. At the time that the Commission issued its complaint against Luria they had a lock on about 85 percent of the steel scrap in this country. Their officials advised me a couple weeks ago that as a result of the Commission's proceeding they now have about 15 or 20 percent of the market. So that has freed up a vast segment of the economy to independent scrap dealers. So we have that type of thing.

Then I have all of the Robinson-Patman Act orders. There are about a thousand of them. Now, the administration of the Robinson-Patman orders is in no small way affected by the provision of the 1959 amendment, and the procedure available to try to enforce those preamendment orders is extremely cumbersome. That has posed many problems. Superimposed on the administration of this complex compliance undertaking, and it is very complex, I had several years ago, just to give the committee an understanding of the problems that we have, that is, caseload in relation to personnel, I had superimposed on the regular compliance burden 56 Sherman Act judgments that were referred to the Commission by the then Attorney General for investigation and report back. So I was lucky, I guess, I got that project also, but my staff structure at that time was reflected by the fact I had 100 2(c) cases assigned to one man. I had 63 2(a) cases assigned to one man. So that these administrative burdens were really impossible at that time. Most fortunately, I think, we have been able to practically eliminate any backlog in the Robinson-Patman area in compliance today so we are relatively current. The same thing is true in my opinion with respect to our section 5 activities.

Mr. SMITH. Did you do that by processing complaints in less cases?

Mr. GERCKE. I am the judgment lawyer. If I had something to say about planning, the Commission would be litigating much more than it is doing today, and I would be dumping complaints out in large numbers, and I really think that there is a very definite need for increased litigation in this area. Now, again, you are talking in terms of staff burden and how much the Commission is going to be able to feather its shot so to speak, how many activities it is going to get into. When Mr. Banta and Mr. Field were commenting this morning I believe there was a question about the desire and need to allocate resources. Well, if we really took the big, big approach as I understand that they were suggesting, I think that the natural sequel to that would be there would be no small business problems

handled by the Federal Trade Commission. I do think that they have to be handled.

There was one other observation, also, and we are all familiar with the American Bar Association report and it is a very odious thing apparently to read your mail these days, but a lot of misunderstanding went into that. The Robinson-Patman Act is a businessman's statute. So when you get mail affecting the Robinson-Patman Act, it is not from a consumer. It is from a businessman who is hurting. And there is a normal degree of intelligence behind that. Now, as distinguished from consumer complaints, which in and of themselves are very important, but normally not attended by the degree of knowledge or professionalism or know-how that you would experience in an Robinson-Patman complaint, so I think, I want to make the point that I think it is very important to pay attention to your mail in the Robinson-Patman area.

Mr. POTVIN. Sir, the allegation was made this morning that Robinson-Patman enforcement is carried on, within the framework of present resources at the Commission at least, at the expense of—I think the phrase you used was—the big ones, that more can be done on mergers, more could be done on anticoncentration work if Robinson-Patman enforcement weren't one of the matters under your custody. Could you speak to that?

Mr. GERCKE. Of course from the compliance end, I am pretty much a creature of what is given to me. I would say that with additional personnel, just from the compliance end, for example, and I think that the problems we have would be related to the trial divisions or as you move on down the line, that we could become more offensive. By that I mean I would like to use my compliance division personnel to a greater extent in affirmative investigation work rather than me having to send a case out to the field where it would assume its normal priority and I would not hear from it for 1 or 2 years. In recent months, as I have been able to lick this tremendous backlog burden that we had, we have been running our own investigational hearing. And I think about 98 percent of the civil penalty cases that we have developed in the last several years were generated by that approach, my using my own personnel. So that is one area that I would like to see us do more about.

I think also that there is a real need to beef up additional complaints in the area of our generic act, section 5, and why there are one only three, four, or five complaints a year in that area I don't know.

Mr. ODEN. Mr. Gerecke, is any communication between your Division and the Division issuing a complaint as far as enforcement.

Considering the fact that your Division is separate from the Trial Division that originally drafts a complaint and tries the case, is there any type of correlation between your Division and the Trial Division in the wording of a complaint as far as future compliance?

Mr. GERCKE. Not in the wording of the complaint, but at times I am asked about an approach to be taken in the phrasing of orders. I do that quite frequently in the area of section 7. And we have made a lot of mistakes, some of which I point out to the trial staff so they won't be repeated. For example, when you have a divestiture order, you should avoid saying "divest to a purchaser" approved by the Commission. In such instance there is the defensive argument that the Commission has permitted us to divest through sale and we want to get our

price and unless we do we don't have to divest. So I would suggest that they delete certain language and just say divest in 1 year. We have moved on and there will be many more mechanical changes in the structuring of those orders.

I recently made a recommendation to the Commission. I don't know whether it is going to meet with unanimous accord at the bureau level and otherwise, that on any consent settlements in the future, excluding section 7 orders which of their nature are in futuro, that the consent settlement package have attached to it the compliance report in which the businessman advises the Commission exactly what the Commission is getting at the time it enters that order. As things work now, not infrequently 60 or 90 days pass after the broad order issues before all of the subjective reservations involving order coverage, product coverage, this and that are ventilated for the first time. I think that under this approach, the Commission, before it puts its imprimatur on the issuance of an order will know exactly where it is going to come out.

Mr. ODEN. That is the reason I asked the question. Chairman Dingell is extremely concerned about the procedures of the Federal Trade Commission and the delays in cases and I know from personal experience at the Commission that very often the Commission would issue an order and a few months later the respondents would come in and say we can't comply with the order and the Compliance Division would say we don't know how to make them comply with the order and then they would reopen the case and actually almost relitigate the whole case over again. I thought you may have some idea as far as some procedures whereby the Compliance Division would have a chance to see the proposed order before it is ever issued so they could say whether an order could be enforced and complied with easily.

Mr. GERCKE. One of the problems with this, and I believe the Department of Justice operated on that system, one of the problems is that I, as a compliance attorney, don't know whether that order is any good or not until I know the metes and bounds of the Government's evidence in that case. And what may look like a pretty weak order might look pretty good in relation to what you can prove. So for us to have to stop the wheels so to speak and to dig into the files and to find out what evidence they had, I think would jam up the works even more. As far as they delay at trial, I am very much interested in that. I recently became chairman of the Commission's Rules Committee, and I will be having very positive recommendations to make to the Commission in the not too distant future in at least several areas.

Mr. ODEN. I was speaking specifically about the *Geritol* case where year after year they couldn't seem to get compliance with their order.

Mr. GERCKE. I am glad to say that is another department.

Mr. POTVIN. Mr. Chairman.

Mr. SMITH. Mr. Potvin.

Mr. POTVIN. Mr. Gercke, I suppose the commonest allegation we have received from those who, in general terms at least, oppose the Robinson-Patman Act is that enforcement of that act in some way raises prices to consumers. As Mr. Compliance down there would it be appropriate for you to perhaps address that briefly?

Mr. GERCKE. Again, I lack empirical data on this.

Mr. POTVIN. I kind of feel you have gotten some insights over the years, though.

Mr. GERCKE. Yes. I see no basis for concluding that enforcement of the Robinson-Patman Act even in an individual case has resulted in elevation of consumer prices. I have a conviction to the contrary. I don't remember all of the cases but one of them, in the automotive parts area there was a defensive mechanism employed: "Well, there is nothing really injurious about us getting this price discrimination because we never cut price to the consumer." So that was the defense in that particular case. I have no basis for concluding that that occurs. This statute is unpopular because it interferes with sellers arrangements with power buyers in many instances.

Mr. POTVIN. And do you feel then, sir, from your years of experience there that the Robinson-Patman Act is an integral and important part of our antitrust structure and not in conflict with other statutes?

Mr. GERCKE. I absolutely feel that it has a place, yes. There have been a lot of mistakes made in administering the act. You can't shoot the No. 5 ranking in a given industry and come out with an effective order. Once you do that he has got a built-in 2(b) defense. So there are administrative problems that we keep trying to improve, keep trying to improve our approach to them, but there are mistakes that are being made, and I hope that we will be able to eradicate more and more of them. But there is a very definite place for Robinson-Patman.

Mr. POTVIN. You are in effect—in a rather muted way—for targeting in on the No. 1's, I gather.

Mr. GERCKE. Yes.

Mr. POTVIN. Thank you, Mr. Chairman.

Mr. WERTHEIMER. You stated during your testimony that in general you cannot commend this report as a scholarly or academic work. I take it you were giving a private, personal view—

Mr. GERCKE. Just my personal view, absolutely.

Mr. WERTHEIMER. Because I would like to note for the record that former Commissioner Nicholson in circulating this work made the following statement: "These attorneys should be commended for their imagination and scholarly work which contains much food for thought. * * * This report is extremely stimulating and provocative." I just raised this to bring out the point that there may very well be differences within the Commission as to the value of this work. You made the same point that practically all of our witnesses have made about the lack of empirical data in this area. Do you feel it is important and would be valuable to have someone somewhere sit down and attempt to put together this often-referred-to empirical data?

Mr. GERCKE. When I initially discussed the project with Hank Banta and Bob Field, I told them that in my opinion the only real empirical study that could be made would be impossible from our standpoint because it would really involve an analysis or the pre-market setting of the order and the post market setting to see if you could really elicit what changes came about. And I think we all recognize that that would have been an almost impossible project for us. It is suspect that such data are available, and it certainly wouldn't be going back some years. That is why I thought that one of the more objective appraisals of the act, if you view it as a method statute, which it properly is, is that the Commission's approval of the com-

pliance reports in upward of 700 or 1,000 of these orders indicates that at least the questioned practices were eradicated to the satisfaction of the Commission. Now, if you asked me whether or not someone is violating one of those orders today, I wouldn't know without a thorough look at it. I don't know where you would go, more directly to answer your question, to get the so-called empirical data. What I find is wrong with this report and some others that have been written on the subject is that absence of data does not provide a barrier to drawing a conclusion. The absence of fact does not create an impediment to great accomplishments.

Mr. WERTHEIMER. Hasn't that been true on all sides of the argument about the Robinson-Patman Act?

Mr. GERCKE. Yes.

Mr. POTVIN. Well customarily, of course, Mr. Gercke, in our society the burden rather tends to be on those who propose change, and it seems to me that to say that there should be certain sweeping changes in the Robinson-Patman Act is a naked assertion unless it is buttressed with facts, and I would have to say I share with you a paucity, an observed paucity of facts in that direction.

Mr. GERCKE. I could give you many illustrations out of my personal experience where the act was maladministered in my opinion. But as I say those mistakes are going to develop in various statutes. I can give you an illustration if you would be interested in one of them.

I think I recommended the first section five inducement cases that the Commission brought against Food Fair and Giant. Now, one thing that I objected to at the time, since they were power buyer cases, was that any suppliers be named respondent in the complaint, and I was overruled on that, and they sued, I don't know, how many, but a goodly number number of suppliers. Food Fair got off under the Packers and Stockyards Act and the suppliers were shot in a power buyer case. Now, that was a mistake. I think we have avoided that for practical purposes in recent years. But again that wasn't anything wrong with the act. It was a wrong call on the administration of it in that particular situation.

Mr. SMITH. Thank you very much.

Mr. GERCKE. Thank you very much.

Mr. SMITH. Mr. Mayer.

Would you identify yourself for the record and proceed.

TESTIMONY OF FRANCIS C. MAYER, CHIEF, DIVISION OF DISCRIMINATORY PRACTICES, FEDERAL TRADE COMMISSION

Mr. MAYER. My name is Francis C. Mayer, Frank Mayer. I am Chief of the Division of Discriminatory Practices in the Bureau of Restraint of Trade at the Federal Trade Commission.

Our jurisdiction is a little bit broader than the Robinson-Patman Act, but our work in the recent years has been totally confined to seeking what we could recommend to the Commission as proper enforcement of this statute.

I would like to make a couple of observations about the report that we have been talking about. One is that it is not a staff report of the Commission. It does not reflect the views, as far as I know,

not Mr. Gericke's views as he stated, nor mine, but it does reflect the views of at least two men on the Compliance Division staff.

One of the faults of this report as I find in reading it is that it ignores that there is such a thing as the Robinson-Patman Act. It relates in no way, as I have studied it, to what are the practical everyday, head-to-head, nose-to-nose problems of the small businessman in the marketplace and in its emphasis upon the seller line and the seller's problems and the structure problems it never really comes to grips with what are the problems of the small businessmen. And I think that is a little bit unusual in evaluating any type of performance of the Robinson-Patman Act, inasmuch as the Robinson-Patman Act is decidedly a small businessman's statute.

In emphasizing the seller side and the seller's problems, I notice that certain key phrases continue to recur and often are drawn directly from our merger experience which are called barriers to entry. This morning, I was pleased to listen to Mr. Bison and his comments upon barriers to entry. But in my opinion the barrier to entry that is being least emphasized in these reports and indeed in these academic studies is the barrier to entry of the small businessman because he can't buy right. It certainly discourages his entry into the business if he knows that when he gets there and he gets into the marketplace he has to head-to-head compete, that he is competing with somebody who is buying at a lower price. And I think that in the Robinson-Patman Act's emphasis on small business that that is the barrier to entry that we should be emphasizing here.

In think, too, in line with some of the testimony this morning that the committee should be aware that we are the only group in Government that on a day-to-day basis is directing its total resources to the enforcement of the Robinson-Patman Act. Our merger section has its counterpart in the Department of Justice. Indeed, I think it is dwarfed by the Department's efforts. Our restraints section also has a counterpart in the Department and I think that in turn dwarfs the Commission's staff and allocation of resources in that area. But when we are talking about enforcing the statutes that this Congress has directed us to enforce, I want you to remember that we are the only group on a day-to-day basis directly involved in the problems of Robinson-Patman.

I think, too, we may have exhausted this point about empirical data, and I also think that the paper demonstrates on its face no real effort to study the Commission's history of Robinson-Patman enforcement. There is a decided lack of investigation or reflection of any investigation as to what happened with relation to those orders. I personally think there is a lot of empirical data in the decided cases with relation to Robinson-Patman. I think the *Morton Salt* case contains a lot of structural data. The *National Dairies Seventh Circuit Jellies and Jams* case is another instance in which there is empirical data available for analysis. But rather than challenge the paper fundamentally on the lack of empirical data, and I think the point is well made, there is a lack of data maybe on both sides, but I also think we are overlooking that empirical data was available to this Congress in 1936. There was a thorough study of the economy of this Nation and the decision of the Congress was that the small businessman needed protection from price discrimination and other discriminations flowing from price

discrimination in an effort to allow him to compete. Now, that is the Robinson-Patman Act and that is what is being overlooked in this paper and that is what is overlooked in the majority of the papers. This paper is not new. The majority of this paper could have been written prior to 1936. There are positions in this paper that have been abandoned by many of the economists. The backward integration problem was one of the great fears of the 1930's about Robinson-Patman but every economist that I know, until this paper, has abandoned that position. I would like to comment, too, upon the statement of priorities given here this morning. I think it was abundantly clear that in any setup of priorities in conjunction with or as a result of this particular study there would be absolutely no room for small business work at the Federal Trade Commission. And I submit that the Congress has told us that the small businessman has a real need for Government protection, and I think we ought to continue to give it to him.

Mr. ODEX. Mr. Mayer, I think one point that the committee was trying to make this morning as far as priorities was that too often this committee receives complaints from small businessmen who say that an act that was designed to protect me in my attempt to compete with larger members of the economy has suddenly been turned around against me because of the fact that through a price fix or some other reason the predominant members of the industry have stopped this man from free competition and he had to resort to possibly price discrimination himself in order to keep his head above the water. I think that is more of what the subcommittee was referring to than going after larger scale so to speak. I think what they were saying is that too often maybe a large member of an industry is violating the Robinson-Patman Act and gets away with it and the smaller competitor gets hit with an order.

Mr. MAYER. I know of no practical experience at least as far as I am concerned—and we have recently completed a rather thorough study of over 5,000 Robinson-Patman investigations, that in the area in which the price discrimination was analyzed that the conclusion was drawn that it was in reality a back-off from a price fix—after all, that is the finest evidence of the price fix, the guy who chisels and gets away from the agreement—I know of no instances which with that knowledge in hand there has been any attempt under Robinson-Patman to continue that price fix. Certainly we go after the price fix.

Mr. POTVIN. Mr. Chairman, Mr. Mayer, you of course, are broadly considered as rather being Mr. Robinson-Patman. Your appearances before the American Bar Association and other bodies have frequently produced papers, speeches, notable not only for their insights, but if I may say so, sir, their eloquence.

Mr. MAYER. Thank you, Mr. Potvin. I am always happy to talk about the Robinson-Patman Act.

Mr. POTVIN. As you know, this sort of thing seems to be sporadic, every 10 years or so they see fit to storm the Hill again and see if they can't get it, if not taken off the books, at least emasculated. Have you ever drawn any conclusions as to what the wellspring of this opposition might be, and I don't mean in a name-calling sort of way but in an economic analysis sense.

Mr. MAYER. Well, sometime I think it is kind of a wearing down process. The act has been criticized as far as I can remember, almost as long as I can remember by the economists, and that hasn't stopped a bit but occasionally the fire gets fanned a little higher. The Utah Pie decision caused a plethora of articles and gave thoughts about where the world is going if this type of decision stands. I hope it stands a long time. I agree thoroughly with Dr. Brooks' testimony here that that case has been tortured beyond all recognition. The analysis of that case is so superficial that I don't think anybody read the first five pages of the decision.

Mr. ODEN. That is also a type of case that this committee likes to see brought also.

Mr. POTVIN. Yes. I think, too often, the potential benefits of private Robinson-Patman suits are overlooked in these analyses.

Well, sir, you have heard or read the entire body of testimony of these hearings, I believe, and as you know this cry has been rather constant from certain sources that the main thing that Robinson-Patman does is it raises prices to the consumer, and if true that would be an evil thing of course. Would you care to comment on it?

Mr. MAYER. Mr. Potvin, I have analyzed a considerable number of the Commission's decisions, and the Commission attempts at enforcement in this area, and I can say that I know of no single instance that I can recall at the moment in which a price was raised because of a Robinson-Patman order.

Mr. POTVIN. What about the corollary? Do you feel that the enforcement of Robinson-Patman has prevented a lowering of prices.

Mr. MAYER. Has prevented the lowering of prices?

Mr. POTVIN. To the consumer?

Mr. MAYER. No, I do not. No, I do not.

Mr. POTVIN. Are you aware of any cases that have been cited by not making these aversions. You say you have just finished an analysis of 5,000 cases.

Mr. MAYER. Well, that was done primarily for our own benefit to get an idea of the areas in which the investigational techniques of the commission have been used to look into the problems, what the problem areas were, and it really wasn't an analysis directed to that point.

Mr. POTVIN. Well, let me ask this. One of the other leading allegations that we continue to receive is that the—well, I guess it would be put about this way, that the Commission just isn't very realistic in making its allocation of resources and establishing priorities, that it just spends an awful lot of time on "trivia." Now, let me ask you this, sir. Let's take—trivial in terms of the size case. Let's take a businessman let's say arbitrarily in Pocatello, Idaho and you have a clear cold price discrimination. Let's even concede for the purpose of argument that it really won't affect competition in the broad national sense. What enforcement will do is keep that guy from going out of business. What other benefits do you see implicit in this entire exercise.

Mr. MAYER. Well, first of all he is entitled to the benefits of the protection of the statute. Secondly, seldom do we bring a case premised upon the disadvantaged position of a wholesaler or retailer, let us say. But if we do it is for the protection of all wholesalers and retailers similarly situated. All the benefits of that particular case, if it involves a system of pricing, will flow to more than one industry. I think the

Commission's attack on volume discounts in the automotive parts field cut down the use—I know it almost eliminated the use of any retro active discounts in all kinds of other industries as well as eradicating them completely from that particular industry.

Mr. POTVIN. In other words, this is not done in a vacuum and there continues to be the hope that it will be instructive to other as yet undetected violators pursuing the same scheme and act as a deterrent.

Mr. MAYER. I hope so. And I also know as a matter of practical experience that the business community is aware of Robinson-Patman. There are numerous very large corporations that have definite standards of conduct related only to Robinson-Patman. I think the Commission's 2(d) and (e) guides have been widely read and I think are being widely followed in general by the industries.

Mr. POTVIN. And finally, sir, a question I hope you will take in the spirit in which it is asked. This morning Mr. Bison reiterated a point made earlier by a very distinguished former chairman of your body, Earl Kintner, and I can do no more than paraphrase it. He said, gee, before we criticize the act why don't we try just once enforcing it. And this I think among those favoring the act is a remark that you do hear occasionally, particularly as to the per se sections—that there never has been vigorous enforcement and therefore those who are criticizing are attacking the effects of enforcement which has not occurred yet. Would you care to comment on that?

Mr. MAYER. There would be some elements of recognition of the practical situation in that statement, yes. I think in its history a thousand orders is not a monumental record for Robinson-Patman work. I really don't know where we are getting the figures about 50 percent of our particular bureau's resources being allocated to Robinson-Patman enforcement. Right at the moment we have 24 lawyers on our staff, and that I think is the smallest of the sections in the Bureau of Restraint of Trade, the enforcement sections. I know of no 15 men in any other division who spend full time of Robinson-Patman enforcement. I would be inclined to say that there are considerably less than that, if any, on a day-to-day full-time basis. Some of the divisions get into Robinson-Patman problems incidentally and on the fringe maybe, but for the direct attention I should think it would be little and that is not unusual. One of our recent cases has a section 7 count in it and a section 5 monopolization count in it. Actually, practically speaking, there are 24 lawyers that day-to-day face the problems of Robinson-Patman.

Mr. POTVIN. Well, if you could find 15 bodies free, I expect you could make good use of them.

Mr. MAYER. I think we could.

Mr. POTVIN. Thank you, Mr. Chairman.

Mr. ODEN. Mr. Mayer, I wonder if we could just emphasize one more time the criticism this committee has received that the Robinson-Patman is helping competitors rather than competition, and I wonder whether it would be true to say that you can never bring an antitrust suit without helping individual competitors?

Mr. MAYER. Right. I think that is a fair observation.

Mr. WERTHEIMER. The general counsel mentioned priorities before in one of his questions. As you know the question of Trade Commission priorities has come up in a number of instances. Are you in a

position to comment directly to that issue? Do you feel that there is a problem at the Commission in terms of priorities?

Mr. MAYER. Well, the overall Commission policy with relation to priorities is really beyond me. We attempt as best we can at the sectional level, or the recommendation level at the Commission to set up a rather hardnosed working set of priorities of our own to determine that we make use of the facilities available to us to the best expenditure of the tax dollar. But the overall priorities—and I of course am not in the policy area, but I urge policy, and strongly urge the continued allocation of funds to Robinson-Patman in the effort to aid the small businessman.

Mr. WERTHEIMER. In response to a question from Mr. Potvin about the effect of Robinson-Patman on consumer prices, you stated you didn't feel it had a detrimental effect on consumer prices. Suppose hypothetically the conclusion was reached that it would or could have a detrimental effect. Do you believe that this should lead to a reconsideration of the effects of the Robinson-Patman Act.

Mr. MAYER. I think it should. I am firmly convinced that the use of Robinson-Patman to protect inefficiency is not only a misuse of the statute but it is not Robinson-Patman. The Robinson-Patman Act recognizes efficiencies. The statute promotes efficiencies. It does not protect inefficiencies, and if it does it is not Robinson-Patman.

Mr. ODEN. Mr. Mayer, we have a copy of Commission's budgetary request for fiscal year 1971 and I wonder if you could explain when the Commission shows in its budget its manpower for each division, it shows the division of discriminatory practices with 44 positions. You have 24 attorneys. I wonder if you could explain to the committee where the—

Mr. MAYER. That is our hope, of course. The full strength allocation to our staff would be 40 attorneys and 4 nonprofessionals. There has been some restructuring within our own bureau, so that other divisions are closer to their allocated strength than we are, but that demonstrates how far we are off—24 as opposed to 40.

Mr. ODEN (continuing). So actually when Congress or a committee looks at a budgetary request like this it simply shows what the Bureau of the Budget is allowing for allocation, not the actual number of employees, or actual number of attorneys you have working in an individual division.

Mr. MAYER. Yes, that is true. And, of course, that wouldn't necessarily reflect on the budget presentation or anything because you have turnovers in personnel. In the past 4 months I think I have lost eight men.

Mr. ODEN. No, but it would—

Mr. MAYER. You just don't turn those over.

Mr. ODEN (continuing). But it would reflect on your ability to enforce the statutes.

Mr. MAYER. Yes, it does.

Mr. WERTHEIMER. Is that eight out of the 24?

Mr. MAYER. No, the 24 is minus the eight. Five or 6 months ago I had 30 or 32.

Mr. POTVIN. Was that the most that internal ceilings would allow you, 32?

Mr. MAYER. Yes.

Mr. WERTHEIMER. The reduction from 32 to 24 was on the basis of turnover?

Mr. MAYER. Yes, sir.

Mr. POTVIN. What would this figure 44, translated in your internal number, result?

Mr. MAYER. Twenty-four. We are attempting to add new people to the staff but only in dribblets of one here or one there.

Mr. POTVIN. You mean to say that even though that piece of paper says 44 that you are only allowed 24? This is not a function of just turnover or anything now?

Mr. MAYER. No. I wouldn't put it quite that we are only allowed 24, but within the allocations within the Bureau there has been some movement between certain of the divisions, some from our particular division, not in great numbers, but we have not replaced the men who have left to bring us up even realistically to those figures.

Mr. POTVIN. Well, when you are talking about 24 lawyers against a background of a society of 200 million people and a GNP that is soaring, you are talking about 25 percent difference between 32 and 24. It seems to me that—don't you find that a little handicapping?

Mr. MAYER. Surely.

Mr. ODEN. Mr. Mayer, did you state whether during fiscal year 1969 you ever hit your budgetary ceiling?

Mr. MAYER. I don't think so.

Mr. ODEN. Have you ever hit your budgetary ceiling of manpower?

Mr. MAYER. I think in about 1963, maybe 1964, we reached the limit of our allocations. I don't think we have had that figure since then.

Mr. ODEN. Mr. Chairman, if it is all right, I would like to ask Mr. Gercke, while he is in the room, about his allocation of manpower in the division of compliance.

Mr. GERCKE. How many are on there?

Mr. ODEN. Thirty-three.

Mr. GERCKE. Yes.

Mr. ODEN. Could you state how many professional and nonprofessional staff members you have now?

Mr. GERCKE. I have 18 attorneys and myself, and I don't know how many girls we would have in the pool, probably seven or eight.

Mr. ODEN. Now, they divide the pool, I take it.

Mr. GERCKE. I run a pool operation. I have my secretary and then all the other attorneys draw from the stenographic pool.

Mr. ODEN. So you have approximately 25 out of 33?

Mr. GERCKE. Yes, I would think so.

Mr. ODEN. Did you hit your budgetary allocation—

Mr. GERCKE. No, I have never been quite up to it. I forget my allocation. I think it is about 24 attorneys.

Mr. ODEN. Thank you. That is all.

Mr. SMITH. That is all. Thank you very much.

Mr. Seales is not here, is that correct? We will wait a minute.

(There was a short recess.)

Mr. SMITH. Mr. Steele. Would you identify yourself and proceed as you desire.

TESTIMONY OF ROBERT W. STEELE, ATTORNEY, WASHINGTON, D.C.

MR. STEELE. Congressman Smith, members of the staff of the subcommittee, and counsel, my name is Robert W. Steele. I am a member of the law firm of Howrey, Simon, Baker, & Murchison in Washington, D.C. I appear on behalf of the witness C. Philip Scales, president of Warehouse Distributors, Inc., of Atlanta, Ga., and also president of Automotive Warehouse Institute, a national trade association of warehouse distributors in the automotive replacement parts industry.

I might say, Congressman Smith, we appear for the purpose of making a statement in regard to the operation of the Robinson-Patman Act in the automotive replacement parts market. It is our feeling and the feeling of Mr. Scales and the association which he represents that the act has played a vital part in the history of this industry in insuring fair and equal competitive practices. It is solely for this reason that we appear before this subcommittee.

I would like the leave of the subcommittee at the outset of our statement to very briefly sketch in perhaps somewhat technical language the exact purport of the Federal Trade Commission's activities in this industry. And when I have given a rather thumbnail sketch of what the Commission has done, Mr. Scales would like to speak to the practical side of this question, which is, what has the act meant in the industry from the standpoint of real competition. And he hopes to bring to the subcommittee some background as to what the buyer, the small businessman in this industry, the person who the act was directed at protecting, what this act is doing for him and what he hopes it will do in the future.

Turning to the more technical side of the picture, the Federal Trade Commission has been extremely active in enforcing the Robinson-Patman Act in the automotive replacement parts market.

In the 1950's the Commission carried on over 100 investigations under section 2(a) and 2(f) of the Robinson-Patman Act in the automotive replacement parts industry. Some 30 proceedings under section 2(a) were initiated against manufacturers charging price discrimination, each of which resulted in the entry of cease and desist orders. Over 17 different proceedings were initiated against major buying organizations each of which joined as respondents some 30 or 40 members of organizations charged with soliciting discriminatory discounts. In each instance the Commission obtained cease and desist orders and the Compliance Division of the Commission moved to try and establish procedures to eliminate the practices originally attacked.

At the heart of every one of these cases is the structure of the automotive industry which with the leave of the subcommittee I will very briefly sketch.

The automotive replacement parts industry is a four-tier distribution structure as opposed to the general picture which the committee has been considering. For instance, in the food industry, you have the typical three tiers: supplier, wholesaler, and retailer. In the automotive industry you have a different picture than that. You have the manufacturer, the supplier; you have a warehouse distributor, which is an organization that sells to the other distributors or jobbers as they are called in automotive terms, and these jobbers in turn resell to dealers at the retail level. So it is a slightly different structure.

Over the years the Federal Trade Commission has established some very clear rules in the automotive replacement parts industry. The first of these rules is it is permissible for a warehouse distributor that buys from a manufacturer to receive a better price than the jobber receives, and generally the warehouse distributor receives approximately a 20 percent better price from the blue sheet which is the price that the jobber buys at if he buys directly from the producer. This does not offend the Robinson-Patman Act because as the Commission has ruled in its cases the warehouse distributor is not in competition with the jobber. The warehouse distributor sells to the jobber. He does not sell to the dealer. And the dealer is the jobber's customer. Hence, there can be no competitive impact in these 20 percent discounts as required by section 2(a).

Where the FTC has found a problem in the automotive replacement parts industry is with the question, the definition of the term warehouse distributor. And particularly the problem arises when some jobber decides that he wishes to make 20 percent better, more profit, a better price than he gets buying as a jobber. And if this jobber calls himself a warehouse or sets up a dummy corporation and induces an extra 20 percent on the merchandise he buys through that dummy organization, naturally you have injury to competition, because that jobber resells to the dealer and he resells in competition with other jobbers who do not get the extra 20 percent. He also cuts the legitimate warehouse distributor out of the jobbing market. The legitimate warehouse distributor has no chance to sell to him because he receives as good a price as the legitimate warehouse. This is what the Commission attacked in brief in all of its proceedings in the 1950's. The Commission established standards in some very famous cases, citations of which I will provide to the subcommittee. First it decided in the *National Parts Warehouse* case that a group of jobbers could not get together and set up their own dummy warehouse to get a better price. And then in the *Monroe* case and the *Purolater* case the Commission held as an obvious corollary of the National Parts Warehouse case that a single jobber could not set up his own warehouse for the purpose of getting a discriminatory price on his purchases.

This then is the law that has been set up for the protection of competition in the automotive replacement parts market. It is a law that is well known. It is well known because there have been many proceedings, and it is a matter that businessmen in the industry discuss. I would like now to introduce Mr. Scales as president of Warehouse Distributors, Inc. to talk a bit about the practical import of this law to the small businessman, the person that was to be protected by the Robinson-Patman Act in this particular industry.

TESTIMONY OF C. PHILIP SCALES, PRESIDENT, WAREHOUSE DISTRIBUTORS, INC.

Mr. SCALES. Thank you, Bob. Congressman, gentlemen, I appreciate the opportunity of being here, and I want to reiterate what Mr. Steele has said, that the Federal Trade Commission in its pursuit of the Robinson-Patman Act and administering that act has helped small businessmen, particularly those of whom I am most familiar, and those are in the automotive replacement parts market. There is

no way that I know of that we could have existed if it had not been for the establishment of rules that we understand, rules that our suppliers understand, rules that our customers understand. After all, the automotive replacement parts market is a comparatively new industry. It has grown like "Topsy" in the last, oh, quarter of a century, I suppose. But in performing its function of getting the merchandise to the consumer, whether a man has a breakdown in some small town in Georgia, or whether he has a breakdown in a large metropolitan center like Washington, D.C., and that is the reason for this four-step distribution system that Mr. Steele pointed out.

We feel that the Robinson-Patman Act is definitely beneficial to the automotive aftermarket and we encourage the enforcement under this act.

I think that the Trade Commission has done a fine job particularly in the past in establishing itself as an arbitrator and enforcing the function that it was set up to do.

Now, recently there has been an advisory opinion issued by the Commission dated December 16, 1969, that is causing a tremendous amount of confusion in our industry. This opinion, if I might recall it to your mind, stated basically that a wholesaler and a retailer could be owned by the same, I guess you would say money, that the common ownership did not violate any law administered by the Commission as long as the wholesale entity did not favor the retail entity with discriminatory discounts not made available to the competitors of the retailer entity.

Now, this short, terse advisory opinion has caused a considerable amount of disturbance in the replacement parts market. That is evidenced by a trade association counsel quoted in a public press release who states "The impact of this new ruling will be widespread. If the functions of jobber and dealer can be lawfully integrated, then there is little reason to assume that the warehouse distributor functions cannot likewise be integrated under joint ownership. This ruling, therefore, apparently overrules in principle the old Purolator and Monroe decisions. This may therefore presage a restructuring of distribution in the automotive aftermarket." Now, sir, these decisions in my understanding went all the way to the courts. These original decisions were not simply rulings made by the Commission on an interpretation of the Robinson-Patman Act.

Mr. SMITH. Then, you have the retailer and up until December 16 then as I understand it he would be required to pay the same price, but now if the jobber is owned by the same company, or majority stock we will say, by the same individual company he could own both the jobber and the retailer. Is the jobber required to make a profit?

Mr. SCALES. I don't guess there is any requirement that anybody make a profit, but that is what he is in business to do.

Mr. SMITH. As long as he was willing to sell to the other retailer he could operate you might say on a nonprofit basis.

Mr. SCALES. That is correct. He would be in that position. Of course, this opinion did say that he must treat these two companies the same, his own company and the independent that he might also sell to.

Mr. SMITH. It would depend somewhat I guess on the geographic area in which he lived or operated his business whether that would affect competition. Did I understand you to say that the warehouse man must sell at the same price?

Mr. SCALES. That would be an assumption, I believe. If it is true, according to this December 16 opinion, that a jobber and dealer could be commonly owned, it certainly could be assumed that a warehouse distributor and jobber could be commonly owned.

Mr. SMITH. But in order to keep either the jobbers or the retailers from having an advantage over the other, in effect what they have done is to limit the number of warehousemen there can be.

Mr. SCALES. Yes.

Mr. SMITH. When I say limit the number, it is really to prevent retailers from becoming warehousemen via the jobber or any other route.

Mr. SCALES. I don't know that I follow exactly what you are getting at, sir.

Mr. STEELE. Mr. Chairman, could I make one comment?

I follow the trend of your questions and I think they are questions that a number of us ask. They are not spelled out in what Mr. Scales has called a rather terse opinion, and whether this is a limitation on the number of warehouses because it will strike at the independent warehousemen such as Mr. Scales, because he can't keep on selling to jobbers that can open up their own warehouses—they will make a better profit dealing through themselves than they will dealing with him—whether it is going to limit the number of warehouses by putting him out of business, whether this is going to be the understanding of the trade or the understanding of the Commission—these are the vital questions left unanswered in this rather terse opinion. And I don't think Mr. Scales or myself, as an attorney I know I cannot answer these questions raised in this two-line opinion, and this is what is concerning Mr. Scales, I do believe.

Mr. SCALES. I think it is the very thing that you ask, sir, and the many questions that are probably just as pertinent are what we would like to have cleared up. We don't understand it either.

Mr. SMITH. What you are really afraid of is that one retailer eventually will be able to buy at a lesser price than another, or at least if he isn't able to buy at a lesser price he will get some of his profit through another route.

Mr. SCALES. That is correct. The opportunity is certainly there.

Mr. POTVIN. Mr. Chairman.

Mr. SMITH. Counsel.

Mr. POTVIN. Mr. Scales, for some years your industry has had the dual role of wholesaler and retailer in which you have a utilization of either the debit memo or the credit memo, that is to say the wholesaler would buy and if he also sold out on the street then as to anything that he sold at retail he would have an arrangement with the supplier that he would send in a memo debiting himself for the cost difference at retail and at wholesale. That has been quite common in the—

Mr. STEELE. Often called a reporting system.

Mr. POTVIN. The reporting system; yes, sir.

Mr. STEELE. At the warehouse level and at the jobber level, yes.

Mr. POTVIN. But, now, this in commonest form I think numerically at least has been the combination retail-wholesaler. Has it also gone on at other levels?

Mr. SCALES. Yes, sir. As a matter of fact, I am more familiar with it at either level. I am more familiar with it at the—

Mr. POTVIN. The wholesaler-jobber combination.

Mr. SCALES. Yes; and also at the warehouse distributor level.

Mr. POTVIN. And that would be warehouse distributor combined with wholesaler.

Mr. SCALES. Yes.

Mr. SMITH. When there are two interim levels, isn't it almost inevitable that there will be a tendency to try to eliminate one of them or try in one way or another to combine them? What is the reason for the two interim levels in this industry compared to others?

Mr. SCALES. It is to get those parts to Dacula, Ga. The little jobber in some small towns all over the country could not afford to carry the complexity of items that would be required to service automobiles, say, from 1950 through 1970 with all these different makes, models, and differences.

Mr. SMITH. You mean the volume of automobile parts is not great enough for elimination of one of the interim levels.

Mr. SCALES. I believe that the warehouse distributor or somebody performing this function, whatever you might want to call him, will be here as long as people travel to these out-of-the-way places. If you broke down in Dacula, Ga., you would need a fan belt just as bad as you would if you were in Des Moines, Iowa, and the only way to get it there is to have a closer shipping point or closer point of availability.

Mr. SMITH. Suppose you need a replacement engine. That is not carried by the jobber on most models, so you have to get it from the factory. Now, what is your procedure?

Mr. SCALES. Well, of course, if you needed a whole engine sir, I imagine you could make some plans far in advance for it. But replacement engines are carried by automotive jobbers.

Mr. SMITH. Well, quite a number of them aren't. For example, an engine for a 1967 Buick. That is not carried by the jobber, is it? Ordinarily, wouldn't a retailer or jobber have to get it from the factory.

Mr. SCALES. I would guess you are probably right about that.

Mr. SMITH. The jobber can't carry all models of engines.

Mr. SCALES. No, sir. And, of course—

Mr. SMITH. Do you actually go through the jobber, though, and then he goes through the warehouse distributor or does the retailer go directly to the factory?

Mr. SCALES. The engine would probably be available from each of those points. I am certain it would be available from the Buick factory in this particular case, and I also imagine that it would be available through the after-market channels. For instance, in Atlanta there is a company called John Rogers Co. who is a tremendous supplier of replacement engines, and I feel sure that in the John Rogers plant would be a 1967 Buick engine.

Mr. SMITH. You still would have to go through each of the levels to get it, wouldn't you?

Mr. SCALES. Yes, in that case.

Mr. ODEN. This is simply one of size, is it not? What you are saying is that the wholesaler is actually the jobber in this type of operation.

Mr. SCALES. Yes. In automotive parts terminology we call them jobbers. I guess wholesaler would be—it would be hard to distinguish between them.

Mr. ODEN. And the warehouse distributor does a lot of functions for the manufacturer—

Mr. SCALES. Correct, sir.

Mr. ODEN (continuing). In having localized warehouses over the United States to where a wholesaler could go.

Mr. SCALES. Correct.

Mr. SMITH. We got a little bit off the subject. Anyway, your feeling is that but for the Robinson-Patman Act there would be some retailers who would be buying at a lesser price than other retailers in the same area.

Mr. SCALES. Well, I feel sure, sir, that the Robinson-Patman Act was designed to protect the small businessman, and I do feel that large, extremely large companies with financial resources not available to most of us would put the squeeze on all levels of this distribution channel.

Mr. SMITH. You do feel then that but for the Robinson-Patman Act there would be unfair pricing at the retail level—I don't want to put words in your mouth. I mean do you feel that way or don't you?

Mr. SCALES. I hate to be closed in just to unfair practices at the retail level. I think there would be unfair pricing at all levels.

Mr. SMITH. Thank you very much.

Mr. SCALES. Thank you, sir. We appreciate the opportunity.

Mr. SMITH. We will adjourn until 10 a.m. tomorrow morning.

(Whereupon, on February 26, 1970, the hearing in the above-entitled matter was recessed until 10 a.m., Friday, February 27.)

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

FRIDAY, FEBRUARY 27, 1970

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359, Rayburn House Office Building, Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representatives Dingell, Conte, and Horton.

Also Present: Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee on the Robinson-Patman Act and antitrust laws and their effect on small business will come to order.

Our first witness this morning is the distinguished Chairman of the Federal Trade Commission, the Honorable Caspar W. Weinberger.

Mr. Chairman, we are pleased to welcome you to the committee for your statement.

Mr. WEINBERGER. Thank you, sir.

Mr. DINGELL. The Chair wishes to inquire, do you have any one that you would like to have sit with you at the table?

Mr. WEINBERGER. Well, Mr. Chairman, Commissioner MacIntyre and Commissioner Elman are here. Commissioner Jones had a speaking engagement at a university and will, therefore, not be able to be here. And Commissioner Dixon had an appointment. The other two commissioners are here, and I would be delighted to have them at the table.

Mr. DINGELL. Mr. Chairman, we do plan to hear Commissioner MacIntyre separately and also to hear Commisioner Elman on March 4.

Mr. WEINBERGER. All right, sir.

Mr. DINGELL. If they have comments today, we would of course, if time and schedule of the committee permits and if you would like to have them sit with you, they would, of course, be welcome.

Mr. WEINBERGER. That would be fine. We have a unanimous Commission statement which I am privileged to be able to present, and if they would care to come up, I would be delighted to have them here.

Mr. DINGELL. Very well. The Chair does not have a prepared statement that I would like to make at this particular time.

We will make an appropriate insertion in the record at a time later.

The Chair is happy to recognize my good friend, Mr. Conte, the ranking minority member of the subcommittee.

Mr. CONTE. Mr. Chairman, I want to take this opportunity to welcome to these hearings the distinguished new Chairman of the Federal Trade Commission. Mr. Caspar Weinberger has had a very distinguished career and a very impressive record of public service in the State of California. You will no doubt find our weather here in Washington a good deal colder, Mr. Weinberger, than you were used to out there on the west coast, but I think the difficult and the challenging job that you have taken can be counted upon to provide you with more than enough of the missing heat. And while your task may be a difficult one, it seems clear that the potential role of the Commission in our economy given the necessary resources and the necessary direction remains of the greatest importance. As you know our committee is presently concerned with the general status of things at FTC as well as with the Robinson-Patman Act. I look forward with great interest to your testimony. I stand ready to provide whatever help and assistance I can in your efforts.

Mr. WEINBERGER. Thank you very much, sir.

Mr. CONTE. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Chairman, we would be most happy to recognize you for the statement that you wish to give on behalf of the Commission, and at the conclusion of that, the Chair will recognize counsel, Mr. Potvin, on behalf of the committee.

**TESTIMONY OF HON. CASPAR W. WEINBERGER, CHAIRMAN,
FEDERAL TRADE COMMISSION, ACCCOMPANIED BY EVERETTE
MacINTYRE AND PHILIP ELMAN, COMMISSIONERS**

Mr. WEINBERGER. Thank you, sir.

Mr. Chairman and members of the committee, I am honored to be able to appear before you today on behalf of, and for, the entire Federal Trade Commission and, in response to your request, to present this statement on the Robinson-Patman Act. Individual Commissioners may have additional supporting statements which will be submitted to your committee. But as I have said, my statement is one with which all Commissioners essentially agree. Also, there will be some detailed statistical material which will be filed with the committee about noon, or this afternoon, which is now being reproduced covering the Commission's administration and enforcement of the act over the years.

Mr. DINGELL. This will be received and permission is afforded at this time, Mr. Chairman, for insertion in the record at the appropriate time in such fashion as you would wish.

Mr. WEINBERGER. Thank you.

In the larger perspective of overall Robinson-Patman enforcement, I think it serves no useful purpose to label those who favor the act or those who oppose it. Such a view assumes that the act is in the nature of a municipal traffic ordinance to be enforced by an unerring radar which can detect those who exceed the set limit of legality. Unfortunately, the Robinson-Patman Act, like most legislation, represents an attempt—a very good attempt—by fallible men acting in good faith to solve real problems. The very nature of the solution—measuring sensitive pricing decisions against a generalized standard of

"discrimination"—is conducive to honest differences among the law enforcers, as well as between the Commission and practitioners at the antitrust bar.

Before coming to the Commission, I received ample notice about the emotionalism, factionalism, and bitterness which allegedly prevailed at the Federal Trade Commission because of this legislation. I was ominously warned by both "friends" and "foes" of the Robinson-Patman Act about the importance of choosing sides at an early date.

Already, however, it has become apparent to me that many of these differences are properly attributable to disagreement in interpreting specific language of the act, rather than a deep division over whether it should or should not be enforced or over its underlying policy and purpose.

As the new chairman of the Commission, you should know that I bring no preconceptions as to the correct interpretation of such as "proportionally equal," or "like grade and quality," or other textual difficulties that so concern both Commissioners and critics alike. As occasions arise in which I am called upon to examine and judge each of these questions, I hope to demonstrate a decent respect for the judicial and administrative precedent, and reach a result which is at least consistent with the legislative intent and common sense. And I am sure all Commissioners try to do no less.

It is my opinion that differing interpretations arising from the language of the act do not form an insurmountable barrier to achieving its basic purpose.

That was more or less a sort of personal introduction. What follows is the statement of the entire Commission, and I am happy to say the unanimous statement of the Commission.

STATEMENT OF THE COMMISSION

All of the Commissioners agree that one of the basic principles underlying the Robinson-Patman Act is that it is unfair to competitors and injurious to the very process of competition for large buyers or large sellers to use their power to give or exact discriminatory price concessions not available to smaller or weaker rivals. Moreover, there is no disagreement at the Commission about the ethical and political ideal which motivated Congress in 1936, when the act was passed—to preserve maximum opportunity for small business by elimination of unfair competitive advantages. Nor is there any disagreement about the basic statutory design that Congress evolved in the Robinson-Patman Act: (1) buyers at the same functional level should start on equal competitive footing so far as pricing is concerned; and (2) both direct, and "disguised" or indirect, discriminations were to be eliminated.

In addition, we all agree that 34 years after the passage of the act there is still ample evidence that by inducing discriminatory favors, whether in the form of prices, allowances, or services, the market position of favored large buyers may be enhanced. This advantage may be used to engage in heavier promotional efforts than smaller rivals can afford. But even if the advantage were to be used for selective or localized price cuts, over the long haul the effect may well be adverse to consumers. The smaller nonfavored firms may be eliminated or

weakened in their competitive effort, concentration may increase, and new firms may be discouraged from entering a market where there is an artificial premium on becoming large enough to exact discriminatory concessions.

Thus, discrimination may work to consolidate concentrated markets and lead eventually to monopoly power to raise prices. All Commissioners would say that by invoking the Robinson-Patman Act to eliminate such discrimination, we are enforcing the statute in a manner consistent with the objectives of the Sherman and Clayton Acts—to eliminate monopolization, and incipient monopolization. In short, despite all the talk about differences, what endures at the Commission is a continuing (and unanimous) belief that the act is a basic and viable tool for preserving competition—a goal fully consonant with all the antitrust laws.

What also endures, and in fact flourishes, is the volume and intensity of the criticism of the act and its enforcement. Most of it is grounded on an alleged discrepancy between the Commission's commitment to the basic purpose of the act and its actual performance in enforcing it.

Some of the critics have claimed that the act has been enforced in such a manner as to contradict its basic purpose through too mechanical and literal applications which work against the best interests of the very small businessman that the act was intended to protect. It is also charged that the Commission may be reading some of the provisions of the act so as to further oligopolistic pricing, to deter new entries, and to discourage the development of new methods of distribution.

We have observed that the criticism is not generally accompanied by hard economic facts. But these critical comments do come from some sources in the academic and legal community, and most significantly, they come from some men who themselves are deeply committed to the antitrust laws in general, and the basic purpose of the Robinson-Patman Act to promote and foster competition in particular.

The sincerity and persistence of this criticism alone would have required the Commission to undertake a reexamination of its administration of the Robinson-Patman Act. From the standpoint of developing interest for its processes, an institution of government must respond by reconsidering the effectiveness of its efforts.

Some of the commissioners are of the view that we are devoting a disproportionate amount of our resources to investigate cases which are subsequently closed by the Commission, and others feel that this investigatory activity has contributed to the enforcement of the Robinson-Patman Act.

The Commission has already launched a study of the effectivenses of Robinson-Patman orders in order to develop essential empirical data of the actual effects of the orders. Certainly, the time is ripe for the Commission to take such inventory of the past successes and failures of its Robinson-Patman enforcement, and on the basis of this comprehensive overview, determine our future direction.

The first phase of this study will cover all orders issued after July 23, 1959, the date of the prefinality amendment. Specific industry studies will follow. Our objectives include the following: (1) Identify those orders which because of changing market or other conditions are no longer viable and constitute an unnecessary drain on the Commiss-

sion's compliance resources; (2) ascertain whether our orders have achieved their stated objectives; (3) determine how each order has served to enhance price competition: how it has influenced new marketing techniques; to what extent it has permitted new distribution efforts to emerge and to what extent it has retarded such efforts; (4) evaluate our selection of the industries which we have singled out for enforcement under sections 2 (a) and (f), and determine the nature and impact of the discrimination challenged, the extent of competitive vitality of the industry at the time of the investigation and following the entry of an order, and the effect of orders on imbalances of economic power where they existed in buyer and seller markets; (5) we should also know the relationship of the elimination of price discrimination to the adoption of other marketing tactics, such as vertical integration, the use of private labels, and the purchasing of the entire supply of a seller.

Finally, (6) this study should also consider the extent to which effective enforcement of the act can include not only case-by-case adjudication, but also rulemaking, or enforcement statements, and the extent to which these various enforcement tools can contribute to a fair and effective way of guidance of lawyers and businessmen who must make day-to-day pricing decisions as well as long-range distribution and marketing decisions.

The Commission has, of course, unique capabilities for conducting such studies and we fully intend to commit adequate staff to this project. We shall call on the private bar as well as the academic and business communities to participate and suggest ways of designing the study so as to eliminate institutional bias or predisposition. The latter is a most important factor in studying a subject so highly charged with emotional overtones.

We shall report to the Congress on the outcome of the study and, if necessary, make appropriate legislative recommendations.

As for the time needed, I should advise the Congress that I am naturally impatient, and it would be my hope we could complete our study by the end of this year. As the study proceeds we will not be immobilized. We expect that there will be no decrease, and perhaps even an increase, in the proportion of our budget devoted to Robinson-Patman enforcement. But the Federal Trade Commission, like all other agencies of Government, does not have—nor will it or should it ever have—unlimited funds. The very process of selecting one matter to investigate, means that another may be deferred. By bringing a complaint which results in a dismissal or ineffective relief, we cause a twofold loss: nothing is gained from the action we brought, and we divert the funds from the action which should have been brought. Sound enforcement and sound budgeting require that we exercise our administrative discretion in such a way that Robinson-Patman funds are invested where they will bring the greatest return in securing the goals of the drafters of that act.

As we have already suggested, we think the greatest return will probably be obtained by concentrating on inducement of anticompetitive discrimination. Not only is this the area where there is common ground for agreement among all Commissioners, but more important, such an enforcement policy would focus at the central evil at which the Robinson-Patman Act was aimed—abuse of large buyer power.

We are aware that neither general statements of overall enforcement goals nor the establishment of immediate priorities necessarily guarantee effective administration for the general public for fairness for the business community. The standards for illegal exploitations of excessive buying power are by no means clear. The Commission has the duty, by proper case selection, of working out the boundaries between abuse of buying power by large firms that damages competition and ordinary buying pressures which are a necessary part of the process of maintaining efficient distribution.

In sum, we must give clear direction to the staff on the kinds of investigations to initiate, a more careful screening of industries where we should concentrate our efforts, and greater flexibility in the selection of the proper enforcement weapon. We hope to achieve some of these objectives by an immediate upgrading of our Program Review Office which will have the responsibility for making recommendations as to the best allocation of our resources in the Robinson-Patman and other fields. And we believe properly the name of this should be the Policy Planning Office.

The basic agreement on enforcement priorities, as well as the support of the entire Commission for the study we have outlined should prove that emotionalism and divisiveness are not inevitable companions in the Robinson-Patman field. We are all committed to vigorous enforcement of the statute based upon the historical purpose of the act, and a realistic appraisal of what the Commission can effectively do.

I have greatly appreciated this opportunity to present this unanimous statement for the Federal Trade Commission. And as I mentioned, we will have detailed statistical data covering our administration ready for filing about noon with the committee.

Mr. DINGELL. Mr. Chairman, I want to commend you for the very fine statement which you have given to us, and I am pleased to see the way you are beginning your chairmanship of the Commission particularly with regard to Robinson-Patman. I look forward to working with you, and I think from many of the goals that you have expressed in your statement, to supporting you in your endeavors.

Chairman WEINBERGER. Thank you, sir.

Mr. DINGELL. As you know, as chairman of this subcommittee and of another subcommittee of this committee and also as a member of another committee, the Committee on Interstate and Foreign Commerce, I have had a great deal of interest in matters affecting the Federal Trade Commission, and legislative affairs that would very directly affect your concerns down there.

A mutual friend of yours and mine, Congressman McCloskey, has spoken highly of you, and I am pleased to see that his well-spoken words about you appear to be very soundly based.

Chairman WEINBERGER. Thank you, sir.

Mr. DINGELL. Mr. Conte.

Mr. CONTE. I am very pleased to hear that you are going to conduct this study. In the hearings that we have had and the hearings I have attended, it would seem that almost across the board everyone complained about the lack of empirical data, and the ABA also came in here and testified that there should be such a study. And I am pleased

to hear that you are going to conduct it. It should be certainly of great value to the Commission and also to this committee which has been studying this matter.

The general problem of the Commission goals and priorities has been raised recently by a number of sources who have come up here. The ABA report, for example, found that most of the FTC's commissioners felt that control by the FTC of its own mission goals and priorities was a most perplexing and largely unsolved problem. Of course, you have only been there a few, a very short tenure. Have you had an opportunity to make an observation in regards to this?

Chairman WEINBERGER. Well, I think that is basically correct, Congressman. I think all the Commissioners are agreed that it is a very difficult thing to set your own priorities in an agency that has as wide responsibilities and authority as the Federal Trade Commission has. The problem primarily is that there is a great volume of staff-generated work. There is a great volume of work that comes in from the mailbag. None of this obviously can be avoided or should be avoided. On the other hand, as with all large operations, when your "in" basket fills up and you empty it, at the end of the day you feel that perhaps that is all you can, or really should do. What we are trying to do is get the proper man to staff this very important vacant position of program review officer. I mentioned this properly should be called policy planning. This will have to be a person who is very familiar with all of the recent developments in both the antitrust and Robinson-Patman fields as well as in the consumer areas, someone who can be freed of administrative detail but can have the opportunity to give advice to the Commission on the areas and the industries and the types of activity that most need attention at a particular time. We want to keep as flexible as the budgeting process permits so that when we are directed and agree that we should go in that direction, we will be able to move, even though it involves perhaps a change of direction.

There are certain areas such as the conglomerate field, certain areas of Robinson-Patman enforcement, certain areas of various consumer activity that will quite likely require Commission attention and to which the Commission itself should be guiding its activities. And this is the principal priority that I have at the moment, is to try to staff this office with the proper people. This is nothing that is new or unique to my chairmanship or to anything that I have developed. This is a criticism and a point that has been made by Commissioners and by people who have looked at the Commission and the difficulties in getting the right person for this work. The position is there. It is funded. It has been vacant for over a year, and I think when we have this position staffed, if we can staff it properly, we will get some very valuable suggestions as to the direction in which the Commission should move along all of the fronts to which it is assigned. And as you know it is assigned a great many different activities.

This I think is the principal problem that we have, and as soon as we solve it with appointing the right person to that office I think we will be able to show to the Congress a much firmer guidance and direction. I think we want to move our own reader rather than having it moved just by various complaints or the various requests or the things that come in the mail or things that an individual staff member might feel are more important than anything else.

Mr. CONTE. I am pleased to hear that the position is there and it has been funded.

Chairman WEINBERGER. Oh, yes.

Mr. CONTE. You won't have a budgetary problem.

Chairman WEINBERGER. No; the position is there and available. As a matter of fact, we had to apply to the Civil Service Commission to keep it alive because it has been vacant, and it is still open, but we are definitely planning to fill this at the earliest possible time we can recruit somebody suitable for it. It is a difficult set of skills, and it is not a position easily recruited. Ideally, it is a lawyer who is very familiar with economic matters and public affairs and the operations of the Federal Government.

Mr. CONTE. One of the things that the ABA report complained about was a lack of leadership in the prevention of retail marketing fraud. Have you been able to look into this in the short time you have been there?

Chairman WEINBERGER. Well, we have been looking at the ABA recommendations as well as many others that have been made. I think that again, the point they had in mind was that primarily it seemed to them that a lot of the Commission's work in the past had been reacting to particular complaints from either competitors or individual purchasers. Again, I think if we have a clearly defined set of priorities placed before the Commission which they can adopt, we will be able to move in perhaps more important directions than it has seemed we have been moving in the past.

Mr. CONTE. I think it is very refreshing to hear what you intend to do, and you will certainly get my cooperation. I am on the Appropriations Committee and if I can be of any assistance I will be glad to help.

Have you been able to review your staff and the tools you have down there, your budget requests and all? Do you feel this is adequate? Do you need more?

Chairman WEINBERGER. Well, I am not certainly in any position at this point to say the Commission needs more money. You were kind enough to speak of my service in California, and I spent a large proportion of my time as director of finance trying to convince State agencies that there was no necessary equation between more money and better quality. And I am not in a position to say that the \$21,375,000 that is proposed for the Commission is in any sense inadequate. There are some vacant positions, there are some dollars that are not used, and I think before I came before the Congress and said that we need more money, I would want to be very certain in my mind that what we have properly directed is not enough. So, I can only answer that at this point, I think we have enough money to do a very good job. And if we need more, and I am really convinced we don't need more—it would take a lot to convince me that we do—then I would be the first to come before the Congress to say we do need more in a particular direction.

Mr. CONTE. Well, this is another refreshing statement from this side of the table and again I want to compliment you on a very fine presentation here today.

Chairman WEINBERGER. Thank you, sir.

Mr. DINGELL. Mr. Potvin.

MR. POTVIN. Mr. Chairman, I realize, as I say, that it is a rather ambiguous term.

Chairman Weinberger, certainly an excellent statement. I think we might, with mutual profit, establish what it does not do in addition to the very eloquent manner in which you have laid forth the affirmative precepts of the statement.

Now, part of the debate that has been raised before this subcommittee for several months now has been the assertion that the per se sections of the Robinson-Patman Act should either not be enforced or should be placed more or less at the bottom of the hierarchy of priorities. Now, I think it is abundantly clear from your language that you do not belong to that school of thought which holds that you might administratively amend legislation without further action by the Congress, is that correct?

Chairman WEINBERGER. That certainly is correct. I have not talked with anyone in the Commission, commissioners or staff or anyone who feels that way. The feeling is that we should reexamine our administration, our enforcement of the act I should say, and if at the conclusion of that study any legislation changes appear desirable, to report those to the Congress, but certainly not to change the act in any sense by administrative action.

MR. POTVIN. Now, one of the other assertions that we have heard to a substantial degree, sir, is that the agency has, over the past perhaps decade, devoted a disproportionate portion of its time to what has been termed as trivia. One of the outstanding examples often cited is the work done in the product, or in the field of Fur Products and the Textile Fiber Products Identification Act, the Wool Products Labeling Act, and to a lesser degree the Flammable Fabrics Act, and I would like, if I may, at this time, Mr. Chairman, to offer for the record, the appendix thereof together with the other acts administered by this agency the full text of those four acts.

MR. DINGELL. Without objections, the documents referred to will appear at the appropriate point in the record.

MR. POTVIN. First of all, Mr. Chairman, could you for the subcommittee give your thoughts in a broad sort of way at least as to whether indeed you consider as an example the Wool Products and Fur Products Acts and their enforcement as mere "trivia?"

Chairman WEINBERGER. No, I don't think anything that the Congress has directed the Commission to do could properly be classified as trivia. There is no question that when you have an allocation of resources, specifically \$21 million in this case, with a certain number of employees you have to try to allocate those resources to the areas of activity which in a particular year seem to be the most important in the minds of the commissioners who have been charged with the enforcement of all of these acts. But I certainly don't think any act that Congress directs us to enforce is in any sense trivia. I think there may well be particular forms of enforcement or particular cases that are less important than others, but cases that may be necessary in the enforcement of each of the acts assigned by the Congress.

MR. POTVIN. Now, sir: fur, of course, is I suppose, inherently a luxury product, that is to say that it is rather hard to associate it in one's mind with some of the more pressing social issues of our day, certainly not in the sense of say the price of groceries, that sort of

thing. Yet, looking at the value of the imported raw furs that come into this Nation each year, we find that it runs into a hundred million dollars a year, and again, with wool, certainly getting what one pays for—virgin fiber that traps air rather than the more compacted shoddy or reclaimed wool—does seem to have a legitimate claim on the affections of your agency. Most important of all these of course is the Flammable Fabrics Act because of the death-dealing nature of the so-called torch dresses, torch night gowns, and so on, I believe is the phrase. And the curtains and certainly just in recent months there has been a tragic demonstration of what can be done to a flammable carpet in a senior citizen's home.

I note on page 81 of your current budget proposal with which you will be appearing before the chairman of our full committee in his capacity as your appropriating subcommittee chairman, you propose to cut back by 42 in the number of personnel of the Bureau of Textiles and Furs. Could you explain briefly—these are primarily out of the division of regulations which would lose 40 people—what effect might that have on the vigor specifically—this is a cut of roughly a third of the total personnel involved, and roughly the same percentage in terms of dollars—what effect will this have on the enforcement of the Flammable Fabrics Act specifically?

Chairman WEINBERGER. It will have none whatever, because we regard that, as you said, of prime importance, and an act which not only is of that high priority but an act which requires personnel and detailed attention in the sense that I am going to explain in a moment, cannot in my view be automated in any way; whereas, the identification of textiles and fur, which is certainly an important part of the Commission's assignment, I think lends itself to a less expensive kind of enforcement because the nature of the problems are comparatively routine, and the work can be I think, on the basis of the very short time I have had a chance to look at it, automated in a way that can be done at a reduced cost basis. This is not true with flammable fabrics. In flammable fabrics we have recently enlarged our policy. We now have a requirement within the Commission that on the same working day that any finding of flammability is made, the Commission Chairman and the Commissioners must be notified by the staff, and we immediately issue a press release if we are unable to satisfy ourselves that we can get direct warning to all potential purchasers or all holders, present holders of the flammable fabric. By the issuance of the press release then we hope to secure notice that we can't get directly. We have had very good cooperation on this from the manufacturers whose fabrics have been involved. We have had telegraphic notifications to some 20,000 given by one of those in a recent situation. And we put out a press release at something like 7:30 Friday night on some nonwoven materials that were in hospital surgical rooms.

Commissioner Elman has been particularly active in this field and has been particularly interested in our shifting our procedures so that we can get notice immediately out to potential holders of fabrics of this kind.

We have been also very interested in the flammability of carpets and rugs that you mentioned, have spent quite a bit of Commission time at that and have developed proposals to the Department of Com-

merce, which has the responsibility as you know for setting the standards, to insure that we do not have any different standards in the purchase of material for Government buildings and hospitals than we may have other areas. We ran into a rather unusual anomaly the other day in which the Government standards for purchasing of carpet were apparently lower than those required in some other areas through some, I suppose, oversight over the years, and we recommend to the Department of Commerce that particularly in areas of public assembly or hospitals that the standard be such that we had at least a uniformly high standard.

Mr. POTVIN. In terms of flammability?

Chairman WEINBERGER. In terms of flammability, yes. And we recognize also there is a very serious problem with the amount of carpet that is already in places that has not been treated to insure flammability.

Mr. DINGELL. The Chair is going to instruct at this point that counsel take this matter up with the General Services Administration and with other Federal agencies to make sure that they establish a pattern of coordination with your agency with regard to these points.

Chairman WEINBERGER. Yes.

Mr. DINGELL. And counsel is at this time directed to direct appropriate communications on behalf of the subcommittee to the General Services Administration and other Government procurement agencies with regard to the point just discussed.

Chairman WEINBERGER. We will be glad to furnish the copies of the letter that we sent to the Department of Commerce that embodied the result of about three Commission meetings on this specific subject relating to flammability or carpets and rugs and Government standards as well as recommended standards for areas of public assembly.

Mr. DINGELL. That would be most helpful. And the committee would very much appreciate receiving those.

Mr. Chairman, you have I think indicated the proper concern for the flammable fabrics legislation which originated in the Commerce Committee, of which I am a member, but I must confess a measure of concern. Here you are talking about a cut in the Division of Enforcement with regard to the Bureau of Textiles and Furs of approximately one-third. Are you telling us that you are going to have the same amount of money, the same emphasis that you had during last year, the same number of personnel that you had during the year past in that particular agency or is there going to be a reduction?

Chairman WEINBERGER. Not the same number of personnel, sir, and not the same amount of money. We will maintain the same or perhaps an increased level of enforcement in the flammable fabrics sections, and it is my hope that by revised internal procedures and new management techniques, we will be able to secure as great a degree of enforcement in the—

Mr. DINGELL. Are you saying you are going to have less personnel in flammable fabrics?

Chairman WEINBERGER. No, sir; not in flammable fabrics. Now, we will not change the level of enforcement except to increase it in flammable fabrics.

Mr. DINGELL. I see. Well, now, I note in your budget here, and I am quoting, it says: "Of the 599 items tested for dangerous flammability,

111 products failed tests and were removed from public sale as wearing apparel. These products which numbered in the tens of thousands of individual items were in six different categories." And then it proceeds to list the categories.

Now, doesn't that indicate a very high level of flammability in consumer products in the country?

Chairman WEINBERGER. Mr. Chairman, there is just no question about it, and we are not in any way satisfied that this new program even that we have adopted for speeding up the notification is in any sense the final answer. Personally, and I hesitate to suggest it without having full information, but I am tending toward the belief that we need some kind of prior approval or prior submission of products of this kind somewhat comparable to the Food and Drug Administration so that you would not have to reach your conclusion of flammability after a product is out on the market. Commissioner MacIntyre has advised of an instance that he is familiar with where are thousands of yards of products, of a particular product found to be highly flammable where in effect the notification is impossible because it is just spread too widely, and you literally simply have to hope for the best. However, if there were some kind of preliminary testing required so that products would not have to be attempted to be recalled, you would I think solve a lot of problems. And we are working on recommendations to the Congress that will solve, I think—I am certainly premature at this point, but I think we will have some sort of recommendation that will involve some kind of we hope practical method of preliminary approvals comparable to the Food and Drug provisions that require testing before a product is actually launched.

Mr. DINGELL. The thought strikes me that you have here a very dangerous situation—

Chairman WEINBERGER. No question about it.

Mr. DINGELL. (continuing). Potentially and yet it strikes me that here you are intending to put no more emphasis on it than you did in the year past even though we have had some warnings of hazard that flow continuously through your hands including this nursing home fire to which Mr. Potvin alluded.

Chairman WEINBERGER. That is correct, but we don't at this point have any reason to suppose that putting additional people on in any specific area necessarily cure the defect. We do have a continuous testing program, and we have the ability to identify materials which are more likely to be flammable than others.

Mr. DINGELL. Of course, I note here, Mr. Chairman, your budget says you tested 599 items.

Chairman WEINBERGER. That is right.

Mr. DINGELL. Out of literally tens of thousands of individual items marketed?

Chairman WEINBERGER. Well, there is—

Mr. DINGELL. This is a very small cross section of the total amount marketed.

Chairman WEINBERGER. It is a fair cross section I am given to understand, Mr. Chairman, of the products and types of material likely to be flammable. There are, as you say, tens of thousands, literally hundreds of thousands of products marketed. Many of

these are known because of either prior testing or because of their inherent nature not to be flammable or not to be likely to be flammable, but ones that are, particularly new products, new clothing, new types of fibers, things of this kind, there is no slight suggestion that the level of testing or the level of enforcement activity be diminished in any way. Quite the contrary.

Mr. DINGELL. Well, if I note correctly, this is approximately one-fifth of the items tested, and I think it would be unfair to say that of the items tested, rather than the items tested reflect the percentage that one would anticipate in items on the market generally, but certainly this should I think give anyone charged with administration of budget and concern for emphasis by your agency a great deal of concern with regard to the hazard that exists in flammable products.

Chairman WEINBERGER. There is no question about our concern with it. We are not proposing—the figures you are reading as, of course, you know are figures for the entire Bureau—

Mr. DINGELL. Yes.

Chairman WEINBERGER. (continuing). That is involved in this activity, both the identification of fibers and textiles and proper labeling as well as the flammable fabrics section, and the flammable fabric portion of that work we have no intention whatever of diminishing, and we are very concerned with it.

Mr. DINGELL. I am concerned, though that your own statistics here indicate that you ought to be increasing emphasis rather than diminishing it, and when I say increasing, when one-fifth of the items tested show a great hazard, it would indicate to me that you need more rather than the same or rather than less. I want to yield to Mr. Potvin.

Chairman WEINBERGER. As you can appreciate, the budget was made up before I arrived, and I want to assure you that if I find that the level of enforcement that is possible under it or under the flexibility that we hope to develop from it is not sufficient, we would certainly reallocate resources. But at the moment it is my hope that we will be able to do it within the dollars there. We also have plans for recommending to the Congress eventually, and again I am somewhat premature, additional government tools with respect to the importation of fabrics by requesting different standards be applied both at customs and at airports and things of that kind.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Chairman Weinberger, prior to your arrival at the Commission as I am sure you know from your perusal of the record of your budget document FTC requested an amount including the extent to which your cutback here, the half million dollars. Bureau of the Budget's initial ruling was to cut it back half a million. Whereupon, your agency appealed from that ruling which appeal was turned down by BOB, and we have those documents. They will, of course, subject to a ruling of the Chair, be made a part of our record at the appropriate time.

Now, since your agency first asked and then reiterated by way of appeal its thinking that it needed that half million dollars for fabrics, yet you are coming to the Congress on Monday asking for lesser amount, and of course it doesn't show that although the hand is yours,

the voice is BOB's, what is your comment? Do you agree with your colleagues who appealed the amount?

Chairman WEINBERGER. My colleagues' action was taken before I got there. My feeling is that we should try to live within the requests of the Bureau of the Budget with respect to the way in which we have suggested the funds be allocated, and as I say we are going to try to do that. If we find we are unable to do it, or if we find that the particular level of enforcement requires more dollars, we would certainly not hesitate to advise the Congress of that. The Bureau of the Budget recommendation did not require or even suggest any reduction in the flammable fabric portion of the enforcement of the Commission's work. It was only in the Bureau of Textiles and Furs which has the responsibility for the enforcement of flammable fabrics.

Mr. DINGELL. Well, now, I think I better make my views plain at this time, Mr. Chairman, because one of the things that consistently, continuously and deeply troubles me is the fact that we never know what the independent agencies want. I am sure you are keenly aware of the fact that the independent agencies like the Federal Trade Commission are arms of the Congress and are not arms of the executive. Am I correct in this?

Chairman WEINBERGER. My understanding is that they are indeed independent agencies. Yes, sir.

Mr. DINGELL. And they are arms of the Congress and not arms of the executive. Am I correct in this interpretation?

Chairman WEINBERGER. Well, I am certainly not in a position to challenge any interpretation you might make of the existing statutes, no. They are certainly not the arms of the Executive Branch. They are, as it is my understanding independent.

Mr. DINGELL. And I wish to preserve that independence, including matters of budget. As I have indicated to you, I am much troubled that we never in the Congress understand fully what your budgetary needs are. We receive only the well sanitized statements from the Bureau of the Budget. We never get a full appreciation of your needs and what the public interest requires you to have to carry out the statutory responsibilities that Congress has given you.

Chairman WEINBERGER. Well, I made some inquiries along this line, Mr. Chairman, and my understanding, the advice I was given is that the only change that was recommended in the Federal Trade Commission's initial submission was this particular amount.

Mr. DINGELL. This one item only.

Chairman WEINBERGER. This one item. That is my understanding, yes, sir.

Mr. POTVIN. Well, Mr. Chairman, isn't it fair to say, sir, that a regular part of the budgetary process not only of your agency, sir, but indeed of all Federal agencies is sort of a continuing rapport. Any agency's budget people after consultations have a pretty good idea of the ballpark figure that will be approved or disapproved so that frequently it's fiscal prudence rather than a realistic estimate of need that produces a request. Isn't that an overall fact in this town?

Chairman WEINBERGER. Well, I certainly can't speak for the budgetary process of all Federal agencies because I have only a wealth of 7 weeks' experience at this point, but I am told that the budget requests of the Federal Trade Commission did go to the Bureau of the Budget,

as I am sure all such requests have to, and that the only suggested change they made was in this one item and that this was simply for a particular bureau. I am also told that it was, stemmed largely from their agreement with the American Bar Association Commission report which mentioned this specific bureau in its report.

Mr. DINGELL. Of course, let me make one thing again very clear. We had the ABA commissioners up here to discuss this.

Chairman WEINBERGER. Yes, sir.

Mr. DINGELL. And the one thing that they made very plain was that they had never considered budgetary requests or the amount of money that it would cost to truly carry out the responsibilities that are imposed upon the Federal Trade Commission by law.

Chairman WEINBERGER. I think that is correct.

Mr. DINGELL. Now, I find myself hard put to understand how much dignity precisely we should afford to a document which is based on so little consideration of one of the most essential parts of the Federal Trade Commission's effectiveness, and that is the level of budgetary support. Now, perhaps, you would like to make some comment on that.

Chairman WEINBERGER. Well, I think that we are concerned with organizational matters. I think that we are concerned with what they found to be failures or deficiencies in the past. I think it is possible to consider these matters apart from budget. As far as looking at matters for the future, it is certainly not realistic to plan the operations of any governmental agency or indeed any activity without a realistic idea of how much money is going to be available. There is just no question about it. I think the primary thrust of their report at least as it appeared to me was an examination of the administration of the agency in the past and an underling of a great many things that they dealt to be deficiencies about that past.

Mr. DINGELL. But how can they make an intelligent appraisal of the functioning of the Commission without understanding the budgetary process.

Chairman WEINBERGER. I am not sure—I don't know whether they even studied the budgetary process.

Mr. DINGELL. He will tell you that the record of this hearing says that they did not study the budgetary process of the agency or the budgetary questions.

Now, accepting this as fact, Mr. Chairman, how are we to regard this as a valid study of the factualness of the adequacy or inadequacy of the Federal Trade Commission?

Chairman WEINBERGER. Well, obviously, how you regard it would be a matter for your own decision.

Mr. DINGELL. How would you regard it if you were in my seat?

Chairman WEINBERGER. I think the report has got some very useful material in it.

Mr. DINGELL. That is not the question, Mr. Chairman. The question was how am I to value a document that doesn't discuss budgetary support. You indicated that this is an essential part of the effectiveness of the agency.

Chairman WEINBERGER. This is correct. There is no question about it. I think it is possible apart from strictly budgetary considerations to examine the performance of an agency in the past and to say, as they did, that in their feeling there was not, there were not adequate

personnel or there had been not a sufficient policy direction, there had not been a sufficient allocation of existing priorities. I think it is possible for a group to say that. It may not be as complete a report as longer time would have permitted, but I think it has to be borne in mind that they had something less than 5 months to do an examination which—

Mr. DINGELL. Well, are you challenging it then on the basis of the fact that they didn't consider one of the most essential aspects of the Federal Trade Commission?

Chairman WEINBERGER. I am not planning to be guided by it in my day-to-day conduct. I think that it has some valuable suggestions and some useful material in it. I am aware of the limitations of it.

Mr. DINGELL. Well, it's pretty plain that it was lacking in one of the most essential components of the effectiveness of the Federal Trade Commission, and that's budgetary support, is it not?

Chairman WEINBERGER. I will certainly accept your statement that this is the testimony before this committee. I had not read that statement.

Mr. DINGELL. I would not deceive you, Mr. Chairman.

Chairman WEINBERGER. No, I know that.

Mr. DINGELL. The record on this fact will speak very clearly, and I will be happy to submit it to you.

Chairman WEINBERGER. I have no question or desire to challenge your summary of the testimony. That does not appear in the report itself and the report is all I have had an opportunity to read.

Mr. DINGELL. I think its failure to appear in the record would tend to indicate its absence and the report is weakened at least to that degree, don't you—

Chairman WEINBERGER. I would certainly not plan to use the report as a bible or anything of the kind. I think it has some useful suggestions, and when I have been asked whether I think the criticisms in it are valid I have repeatedly said I have had no basis for measuring the criticisms as against the actual facts that exist at the agency.

Mr. DINGELL. Now, also the records of this committee and the transcript of this hearing will also indicate that the ABA Commission did not consider the procedural aspects inside the Commission from the standpoint of efficiency, an on-going procedure for hearing cases and for bringing them to a rapid, expeditious and efficient and just conclusion. Now, doesn't this again raise questions about the worthiness of the ABA report?

Chairman WEINBERGER. Well, if they failed completely to consider internal procedures, it certainly would. I gather from reading the report they had at least made some comments and devoted some time to what they reported as excessive delays in internal handling of matters. They cited several cases that had taken many years to work their way through various procedural—

Mr. DINGELL. But they have not commented, for example, on ways in which the rules of the agency itself could be updated to be modern and efficient so these cases could be expeditiously concluded instead of waiting for—the standard figure I hear is 7 years.

Chairman WEINBERGER. This is certainly something they did not do, and this is something we are presently engaged in at the moment.

We are not engaged in a very intensive study of our internal rules and procedures, and we have recently adopted one rule that was strongly recommended to us by the administrative conference, of which Mr. Elman is our representative on that conference, to adopt a summary procedure rule comparable to rule 56 of the Federal Rules of Civil Procedure. And this is a first step. We have also in mind and will shortly announce the appointment of a committee to examine our own rules and to make recommendation for expediting procedures. We have taken a couple small steps in that direction, by turning down several requests for interlocutory appeals from various stages of the hearing examiner's procedures so that we will have the hearing phase completed, and the Commission as a whole then can examine all at one time the various points sought to be raised by individual interlocutory appeals.

These are things we are doing now ourselves to try to improve the interim rules and procedures to eliminate some of these delays.

Mr. DINGELL. Of course, in this matter you received no assistance from the ABA because their report did not direct itself to procedures at all.

Chairman WEINBERGER. It did not, no.

Mr. DINGELL. I find myself, and I want you to comment on this, rather in the position of the fellow that listened to the story about three blind men who went to look for an elephant and one of them says it is long, it is skinny, and it moves like a snake. This is the one that looked at the trunk. And the second one said, no, it is like an oak tree. It is huge and round and impossible to move. He had looked at the leg. And the next one had walked around and thumped it on the side and he said, no, it is shaped like a monstrous barrel.

And I find myself in a position of having a group of people who having felt the trunk and the legs and the barrel of an elephant but have not taken the time to really consider all of the fundamental problems. And I find myself hard put to value a report that hasn't considered more carefully all of the problems that exist. And I find that their report, even the decisions that they arrive at that may very well be valid to be somewhat tainted by a total lack of consideration of two of the most important aspects of your day-to-day operations: one, your budget, and two, your procedures.

Chairman WEINBERGER. Well, passing as inappropriate the opportunity you have given me to comment about the virtues of the elephant, I will simply say that the ABA report is one of the documents I have looked at in connection with the study I tried to do of the Federal Trade Commission. I think there is some useful material in it. There are several other documents I have looked at, but I have no feeling that it should be applied as any bible to the day-to-day administration of the Commission.

Mr. DINGELL. I would want to make it very clear that your policies are to be dictated by the Congress and not by the ABA.

Chairman WEINBERGER. Oh, there is no question about that. I haven't the slightest doubt about that.

Mr. DINGELL. Mr. Conte has a question.

Mr. CONTE. Well, I wanted to make two points. Not that I feel the ABA report is in need of defense, but the time which they had was very short. They began in April and finished on September 15.

Chairman WEINBERGER. Yes.

Mr. CONTE. And though they didn't go into procedures in length they did say, and I quote from their report: "The two recurring criticisms of the FTC that we have been in a position to evaluate, failure to plan and the crippling delay of its procedures, are about as serious today as at any time in the agency's history." So they did address this problem even though they did not go into procedures in depth.

Chairman WEINBERGER. They certainly mentioned delays, and one thing I think was significant about that report, it is one of the few reports I have ever heard of that was delivered on time. It was a report requested to be delivered on a specific day in September, and on that day it appeared.

Mr. CONTE. I will tell you they made their report a lot faster than Congress makes reports on matters. We have been trying to reorganize the Congress here for a good many years, and we haven't even gotten off first base.

Mr. DINGELL. Of course the Chair must observe that one wonders whether a report done in haste has the value of one that is done with more consideration of fundamental and essential problems.

Mr. CONTE. The other point I wanted to make was that in the short time you have been there, in regards to this question of the budget being cut in this area, I find that these cuts are being made one in regulation and only two positions in enforcement, but as I see it from your testimony here today—it isn't just a question of more people and more money but rather there should be some basic changes in the law?

Chairman WEINBERGER. That is correct.

Mr. CONTE. I happen to sit on the committee handling appropriations for customs. A lot of this material comes from overseas from Hong Kong, Taiwan, and countries out in Southeast Asia, and if you had an examination procedure prior to it getting onto the market it would be a lot easier for customs to stop the material from coming into this country. That would stop a significant flow of it anyway.

Chairman WEINBERGER. No question, Congressman. And also on the point you made if, for example, Congress should change the law along the lines I indicated with respect to some procedure to examine the material before it is put on the market, obviously, we would need a lot more people in the enforcement activity assigned to the FTC. There is just no question about that. And obviously, I wouldn't hesitate to advise the Congress, as they would already know that more personnel were needed in that particular area. But I think a lot could be done to improve the situation of the American consumer if we could stop some of the importations of flammable fabrics and other materials, and also if we had some kind of pretesting before they are launched on our market domestically.

Mr. CONTE. Thank you, sir.

Mr. DINGELL. Mr. Potvin.

Mr. HORTON. Mr. Chairman, may I ask just one question?

Mr. DINGELL. Mr. Horton, certainly.

Mr. HORTON. Mr. Chairman, I was glad to see that our chairman is so interested in the elephant these days.

Mr. DINGELL. Well, the chairman has a great—has a long record of friendship toward endangered species.

Mr. HORTON. That one ought to be preserved.

Mr. Chairman, I would just—and I don't want to go further into this ABA report—I am sure that what you are going to do is take into consideration the report and where you feel that there is good criticism you will, I am sure, try to adjust to implement that criticism. I would certainly assume that it is a valuable report in the sense that it does represent the thinking of the American Bar Association and it is a report which you will certainly have to give some credence to. I don't think you are bound by it, but it certainly does at least demonstrate some aspects that ought to be looked at very carefully.

Chairman WEINBERGER. There is no question about it. I did a lot of reading after the appointment was announced, and this was certainly a very useful work in giving me a lot of insight into some of the problems that were there and some of the findings of a group of very, very distinguished attorneys, and I treated it as one of several documents that I was going to try to study and examine and measure the validity of when I was able to take office.

Mr. HORTON. I am sorry I wasn't here to hear your testimony. I tried to run through it quickly. But do you anticipate that you will be making some recommendations to the committee with regard to Robinson-Patman Act enforcement?

Chairman WEINBERGER. If at the conclusion of our study that seems warranted, yes, sir. We mentioned in the statement that I gave before you were able to get here that we are beginning a full-scale study of our enforcement by examining all orders that we have issued since the prefinality date in 1959 and at the conclusion of that time if we felt any changes in the act itself were warranted, we would so report to the Congress, and we would certainly report the findings of our study in any event.

Mr. HORTON. The substance of it is you are giving it some very critical analysis; you do expect to have a careful study of the Robinson-Patman Act, and you hope to utilize it to its fullest as far as it exists on the books today.

Chairman WEINBERGER. Without any question; yes, sir.

Mr. HORTON. Thank you.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Mr. Chairman Weinberger, I would certainly like to commend you and your colleagues on the Commission for the work that you are commencing to do in the field of consumer product standards. As you may know, Chairman Dingell has introduced legislation requiring that any standard, public or private, prior to being introduced into the flow of commerce would have to have your agency's approval of the consumer aspects of it. And I note on page 79 of your budget document that you are undertaking to employ attorneys to work specifically in this field. It is certainly one that is most important in many areas. One that I think Members of the House generally have been receiving a great deal of mail on is this fabric thing, the housewife who starts to iron the shirt and the iron goes right through. Certainly Bess Myerson Grant in New York has been remarkably eloquent on that.

Chairman WEINBERGER. We have hearings underway on that now with respect to certain requirements of labeling as to the proper laundry or dry cleaning care of some of the—of all of the new fabrics, and those hearings I expect will result, I hope by spring, in some sort of trade regulation rule that would be applicable to the entire industry.

Mr. DINGELL. Mr. Chairman, the Chair does have a matter of some concern. As chairman for another subcommittee for awhile I have been going into the question of lumber standards, and in the Federal Trade Commission report on grading and misgrading of softwood lumber, I testified at your agency on, rather at the hearing on which the report was based, and I noted on page 27 of the report of your agency that, "Either improper grading is occurring too frequently or the Board of Review must obtain more data to sustain its contention that its present limited data collected from spot checks is misleading." This was obvious from examination of American Lumber Standards Committee Inspection Records available at that time.

This subcommittee recently subpoenaed the inspection reports of the American Lumber Standards Committee of inspections made since May 6, 1968 to late December 1969 to see what the track record shows, and I have a copy of these records here which I will have the staff present to you. And the FHA and the Commerce Department will also receive copies of the inspection records.

A statistical check of the data reveals 866 separate inspection sheets covering 1,456 separate items or lots. For tabulation purposes, my staff has assigned each sheet a number and each lot a letter. A summary sheet has also been prepared, which I am also supplying you.

Because lumber grading is not an exact and precise art, some measure of human error is allowed under the existing American Lumber Standard. A relatively liberal tolerance of 5 percent of the pieces in a lot below grade has been considered passable. The Commerce Department's recently announced revision of the Lumber Standard is even more restrictive, requiring both grade and moisture content violations to be less than 5 percent of the pieces in any inspection.

In documents now before you, incredible as it may seem, less than 50 percent of the lots meet the passing requirement of not more than 5 percent of the pieces below grade. Out of 1,456 lots, 686, or 47 percent passed. A total of 439 lots, or 30 percent, had between 5.1 percent, and 10 percent of the pieces below grade, and the balance, 23 percent had even higher percentages of violations ranging even above 50 percent below grade.

The record is inexcusable. It is an arrogant flaunting of the FTC report. It shows total disregard toward consumers. Most critically, it indicates waste of resources. With such a record as this, designers and engineers cannot help but be wasteful of wood in design.

I have seen nothing to date to indicate to me that the situation will change and of course your agency, the Federal Trade Commission has expressed a great deal of concern with regard to these matters.

Examination of records discloses other practices which disturb me greatly. One is mislabeled lumber, wherein a weaker species is labeled as if it were a much stronger one. Unsafe structures could result from this abuse in lumber grading. The reports indicate there is still some

untrademarked lumber being shipped, undersize lumber being manufactured and not marked, illegible grading stamps being used, and even pieces with conflicting stamps at either end of the piece. And I do wish you to know that we will submit other information to you on this matter to find out the Federal Trade Commission's views, and also we are going to have the Department of Commerce and some of the private agencies before the committee for a hearing to be conducted on lumber standards to be commenced on Thursday, March 12, 1970.

Now, Mr. Chairman, I am not asking you for an immediate comment, but I would like you to review the matters that I will be submitting to you so that you may give us the benefit of your views at a time when you are more comfortable and have had an opportunity to scrutinize it.

Chairman WEINBERGER. We certainly would want to do it. I would share your concern about this on the basis of personal experience on purchasing some pine recently which was obviously mislabeled, so I will be interested in looking through this.

Mr. DINGELL. We can show you some examples of so-called lumber that meets the standards, and it looks like corkscrews.

Chairman WEINBERGER. Mine wasn't even good firewood.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. To provide some statistical backup for that statement, Mr. Chairman, as you unquestionably know, a very lengthy dialog as occurred over the last several years over the assignment of stiffness and stress values to lumber grades. Letters from the FTC to the Commerce Department of May 5, 1969, and June 13, 1969, indicate it would be in the public interest when various species of trees are grouped for marketing purposes that the least stiff would govern.

On October 7, 1969, a letter from the Federal Trade Commission to the chairman of this subcommittee, a copy of which you now have, upholds this position. Correspondence and testimony of the Federal Housing Administration has all unequivocally stated that when various species of wood are grouped for marketing purposes the least stiff and weakest member of the group shall be used in rule books and, hence, on labels. A copy of that letter is also being supplied for your information.

The lumber industry, on the other hand, has agreed to the use of weighted averages of averages. In the new standard the Commerce Department indicated to the FTC that it would make recommendations to the FTC, to this subcommittee, and to the rule writing agencies on his matter. Chairman Dingell has written them concerning this, a copy of which you are being supplied. To his knowledge nothing has been received.

Today, in the light of these inspection records again it appears that there can be no justifying for any weakening of this position on stiffness values.

Sir, would you not agree that the enlightened position heretofore taken by your agency that when several species of trees are grouped under a common name for marketing purposes that the stiffness value ascribed to the entire group should be that of the least stiff member

of the group is correct, and that using a higher value would run grave risk of violating the FTC Act?

Chairman WEINBERGER. Well, my familiarity with this subject begins from this point. I have not seen these letters before. Certainly, the way you would phrase it I would have no basis now whatever for disagreeing with that statement.

Mr. POTVIN. Well, in closing, we realize that these are technical matters and it is difficult, but of course anyone can read a moisture meter and you do have offices in Seattle in the southern pine area. Would it in your opinion be possible to have some of them go out and actually look at pieces of wood with moisture meters in lumber mills to see if the public is being bilked?

Chairman WEINBERGER. It would not only be possible but entirely appropriate because this would be a matter that would be directly within the Commission's jurisdiction under section V of the act. I wouldn't have any doubt about that, and we would be delighted, on request, to send personnel from the Seattle office or to employ under contract people able to make tests of this kind. I would hope and assume we will get copies of today's transcript so that we will have an opportunity to follow directly on this because I have not been making notes.

Mr. DINGELL. We will see to that, Mr. Chairman.

Chairman WEINBERGER. Good.

Mr. DINGELL. We will also see to it that our staff works with your staff so that we are able to cooperate most harmoniously.

Chairman WEINBERGER. Good. Thank you very much, sir.

Mr. POTVIN. Mr. Chairman, the next specific that I would like to secure your views on has to do with an advisory opinion issued on December 16 by your agency. It is quite brief. It states that—you followed the customary and traditional Commission procedure of putting out a very brief press release rather than the body of the advisory opinion.

Chairman WEINBERGER. What was the date of this, Mr. Potvin?

Mr. POTVIN. December 16, sir, entitled "Common Ownership of Auto Parts Wholesaler and Auto Parts Retailer."

"The Commission expressed the view," your release states, "that the common ownership of the automotive parts wholesaler and automotive parts retailer would not violate any law administered by the Commission so long as the wholesaler entity did not favor the retail entity with discriminatory discounts not made available to competitors of the retail entity."

Commissioner MacIntyre did not concur. There is following a separate statement from then Chairman Dixon.

This opinion has caused great furor in the automotive after sales industry, sir. I would like to read you just two or three lines of the statement of Harold T. Halfpenny, counsel to the Automotive Services Industry Association when he appeared. He states, "The advisory opinion is silent with respect to factors" and this is underlined, "other than common ownership which according to many decisions of the courts and the FTC itself, can affect such a relationship so as to make unlawful the granting and receipt of certain discounts." And he then goes on to raise this question, that I believe the historic position and understanding of that industry has been that the

combining of entities from different levels is not objectionable provided that each is separately operated and managed. Unhappily, the advisory opinion, or at least the press release on it is silent on that point. Would it be possible either now or at your comfortable convenience in writing to secure some enlightenment of the thinking in the Commission on that crucial point?

Chairman WEINBERGER. Well, I think without question we have a specific case under discussion at the Commission at the moment, and in view of that I think it would probably be inappropriate if I expressed my views on that previous advisory opinion. But in addition to that case, we are also preparing in response to a request from a Senate subcommittee some testimony on this specific subject, and we would be very glad when the Commission has worked out a position statement on it for that committee to submit a copy to this committee.

Mr. DINGELL. I think it would be helpful.

Chairman WEINBERGER. That is Senator Hart's subcommittee, I believe.

Mr. DINGELL. We do hope, Mr. Chairman, that you will bear well in mind, as I am sure you will, the warnings of the Pillsbury decision on this.

Chairman WEINBERGER. Yes.

Mr. DINGELL. And the Chair wishes to insert in the record at this point for the protection of the Commission and yourself and of course of this committee that it is not our intention to influence you in any matters now pending before the Commission with regard to affairs here, and I am sure you understand that.

Chairman WEINBERGER. I understand that.

Mr. POTVIN. And finally, Mr. Chairman, on January 12 of this year Chairman Dingell wrote you a letter inquiring as to the status of *Lynchburg Battery and Ignition Company* case and certain other matters. We seem to date not to have received a reply. Could you ask your staff to look into the matter?

Chairman WEINBERGER. I certainly would. I hope you had an acknowledgement.

Mr. POTVIN. I believe so.

Chairman WEINBERGER. I would assume that the reply would be forthcoming very shortly. One of the things I have been most concerned about has been rapid response to the mail, and I find in some cases that we are further behind than I would like to be. I don't think we should be more than 2 weeks after receipt of a letter in our ability to give a response. In this case if you haven't received a reply, I would certainly see to it that you do.

What was the specific matter?

Mr. POTVIN. Lynchburg Battery & Ignition Co., was the first of perhaps six firms.

Mr. DINGELL. We will have our staff communicate with you on this matter, Mr. Chairman.

Chairman WEINBERGER. Right. We will get a response on this one.

Mr. POTVIN. A thoroughly gracious interim letter was received.

Chairman WEINBERGER. I do want to get our complete responses I hope to the point of no more than 2 weeks, and ordinarily I hope a lot less time elapses before we can get the response back.

Mr. POTVIN. Mr. Chairman, I would like to offer for the record at this time if I may, a group of statistical tabulations prepared by the Commission at your request concerning such matters as the closing of Robinson-Patman cases, the issuance of Robinson-Patman complaints, vote on interlocutory rulings involving Robinson-Patman issues, vote on issuances of complaints and interlocutory rulings, and votes of commissioners on advisory opinions containing Robinson-Patman issues since 1961.

Mr. DINGELL. Without objection, the documents alluded to will be inserted in the record at this particular point.

Chairman WEINBERGER. Could I ask, Mr. Chairman, that the statistical material that we are to furnish appear immediately following the formal statement I made this morning?

Mr. DINGELL. It certainly will be so ordered, Mr. Chairman, and we will have our staff to work with yours to see to it that the record reflects your judgment as to how the insertions should be made.

Chairman WEINBERGER. Thank you, sir.

Mr. DINGELL. The Chair is troubled about some points. I want to come back to this business of the Bureau of the Budget. When your agency sends out questionnaires to the industry, you have to clear them with the Bureau of the Budget, do you not?

Chairman WEINBERGER. I can't answer that, sir. I am not sure. I don't know the answer to that question.

Mr. DINGELL. I believe if you will check, you will find the answer is yes, or if you check with your brothers there at the table, I am sure they would indicate that the answer is yes.

Commissioner MacIntyre, out of his voluminous knowledge of these matters, advises me that under the Federal Information Act of 1942, if more than 10 reports, 10 questionnaires or 10 requests go out on the same day, they do have to be submitted to the Bureau of the Budget under existing legislation.

I am deeply indebted to Mr. MacIntyre. He carries this information around with him all the time. I don't know how he does it.

Mr. DINGELL. He is an alumnus of this committee, Mr. Chairman.

I am wondering does this in any—perhaps you would like to submit an answer on this point because I think in fairness I can't ask you to comment here. But when you find it comfortable to do so, I would like to know if you don't have the feeling that this impinges somewhat upon your freedom to perform your assigned responsibilities under law.

Chairman WEINBERGER. I would not be able to comment on it now because I have had no experience with the statute. I would certainly be happy to submit a statement to the committee as soon as I can.

Mr. DINGELL. Just your honest feelings on it would be quite appropriate.

Chairman WEINBERGER. Yes.

Mr. DINGELL. Now, I would like to go on to the question of the Bureau of the Budget. The total dollar sign budget of your agency is \$21,375,000. Within that are assigned certain areas of allocation funds. You will receive for one particular part of your agency a dollars and a certain number of positions. In another part of your Commission you will receive again a different amount. For investigations and things of this kind you will receive still a third amount.

Doesn't this allocation of resources dictate to you and determine the level of emphasis that you will assert to each particular aspect of your daily affairs?

Chairman WEINBERGER. Yes. The budget making process is perhaps the single most important factor in determining the direction that any agency goes. And this is one of the things that necessarily concerns me, because of course that entire budget was completed before I was able to take the oath of office. That is the budget that will take effect on July 1, and I am hoping that we will be able to achieve under that, even though there have been some indications and presentations to the Congress in the budget of particular areas of activity, I am hoping we will be able to secure some flexibility, in the event we decide on further examination of these matters between now and June that we ought to go in a different direction, that we will be permitted to do so.

But there is no question at all that the budget making process determines the way and the direction in which an agency goes, and that is why I am so anxious that this program review officer or policy planning officer that I spoke of, when he is appointed, will work very closely with our own internal budget making processes.

Mr. DINGELL. This does indicate the allocation of resources and the emphasis that is given to a particular program within your agency.

Chairman WEINBERGER. Without question.

Mr. DINGELL. If the Bureau of the Budget says you get *X* dollars for flammable fabrics or wool labeling or furs or for enforcement of Robinson-Patman, that is about the level of enforcement that you are going to be able to give, isn't it?

Chairman WEINBERGER. That's right. I am not familiar, sir, and it is my fault that I am not yet, with the degree of control or the degree of specificity the Bureau of the Budget in the Federal system attempts to impose.

In California for what it is worth we did prepare rather detailed line item budgets for each agency. I heard some suggestion that lump sum items are ordinarily allocated by the Bureau of the Budget, and the agency works out its own allocation within that. I cannot really be helpful to the committee on that because I just don't have enough experience to know.

Mr. DINGELL. Doesn't that very, very largely indicate to you the course of action and doesn't it in fact lay out the policies of your agency for you by determining you are going to be able to bring with a given amount of manpower and dollar resources a given number of cases in a particular area; for example, Robinson-Patman or anti-trust or something of this kind?

Chairman WEINBERGER. Subject to the additional freedom that improved internal management would give, this is very largely true. If the \$21,375,000 is allocated dollar-by-dollar, position-by-position then there is no flexibility, and there is no question that a look at the budget document would tell you exactly what the agency was going to be able to do for the following year. And since the budget is made up somewhere between 10 and 12 months ahead of the time when it actually comes into effect, this has a very stratifying and inflexible effect on the whole of the Commission's work.

Mr. DINGELL. It also dictates your policies in a very large degree.

Chairman WEINBERGER. To a very considerable extent; yes sir. And it is very hard to try to predict that long ahead what will be the areas of greatest need at any particular moment. So that is why I am hopeful that we will be able to have some flexibility within the distribution of this overall sum of \$21 million.

Mr. DINGELL. You ought to also have a measure of freedom in determining what the overall sum should be since the allocation of resources within the overall sum is very largely dictated by the overall sum.

Chairman WEINBERGER. Well, again, there certainly can't be very much quarrel with that. The overall sum is necessarily limited by the overview that has to be given to the entire conduct of the Government, and we are but one agency. So we have to be fitted into the higher scheme of things and any general economy policy has to be, of course, observed because we have to live within the dollars that are available for us. But there is no doubt—

Mr. DINGELL. We come back to the same bitter feelings that I have about your agency being independent, and my desire to have you honestly independent and not fall under the thrall of the administration—have you be an arm of Congress as you were intended to be when the agency was created.

Chairman WEINBERGER. I don't know of any degree of control that is normally exercised by the Bureau of the Budget over comparable agencies to ours. I was told that the only item on which any question had come up was this \$500,000 item that you mentioned earlier.

Mr. DINGELL. I see.

Well, thank you very much. Mr. Conte.

Mr. CONTE. In the conclusions of the ABA report they said that "Nevertheless, it is our impression that there are too many instances of incompetence in the agency particularly in senior staff positions." And you boxed in like a lot of agencies in the Government where people get frozen in under Civil Service laws? What flexibility do you have?

Chairman WEINBERGER. I know there is some flexibility even under a fairly rigid civil service system such as we have in some of the States. I am advised that there is some degree of flexibility that can be obtained both by internal reorganization and by judicious transfers.

I am aware of that criticism that has been made about some of the personnel, and one of the things I am doing quite naturally, as I am sure anyone would do coming into the position of this kind, is to examine and reexamine the performance and the capabilities of everyone that is in a major position of this kind at the Federal Trade Commission. We have made one or two changes already. We would hope to make additional changes. Naturally you want to have, and I am sure one in the same position would feel the same way, people in whom you personally have as much confidence as you can. And I know the commissioners feel this way also.

Mr. CONTE. I am not familiar with FTC operations. I should say I am not that familiar with them but I do know the foreign aid, AID agency because I have been handling that budget for 12 years. They have been boxed in there from a personnel standpoint—they have people who have been there since the old Marshall Plan days and who

cannot be moved. And every time they come to the Congress to try to get a little flexibility Congress knocks them down.

Mr. DINGELL. Would the gentleman yield?

Mr. CONTE. Yes.

Mr. DINGELL. I note that the civil service rules and regulations do not apply to attorneys.

Chairman WEINBERGER. I am told that they are in a schedule A but that there is still in the career service a substantial amount of rigidity and a substantial amount—or another way of phrasing it, a substantial amount of protection for the tenure positions even though they are not formally part of the civil service.

I can't answer in any detail, but I do know that there is some opportunity for transfer and some opportunity for new appointments. There are a certain number of vacant positions at the Commission at the moment owing to resignations and the expired or unfilled positions, and certainly to the greatest extent we can we want to bring in people who are not only highly competent but people who are enthusiastic, who haven't lost their enthusiasm, and people who are eager to do the kind of job that I think the Congress intends the Commission to do.

Mr. DINGELL. I note. **Mr. Chairman,** that the number is 204 employees as of December 1, 1969 and that this is out of a total number of 12,065 employees. My arithmetic indicates a vacancy of about 15 percent.

Chairman WEINBERGER. Yes. I think that those are the figures that I have, and while all of these obviously are not policymaking positions, I think this is a fairly standard rate of vacancy, though I believe there is a higher rate of policy, or higher level positions vacant at the moment than would otherwise be the case.

Mr. DINGELL. It would appear to me that the Commission could function a great deal more efficiently if it would fill these positions in haste so that you had the people to do the jobs that need to be done and that everybody has agreed the Commission is not doing.

Chairman WEINBERGER. There is no question about it, and the only reason I am moving somewhat slowly in this area is because I want to be sure because of the facts Mr. Conte mentioned about the difficulties in removal that we do get the right people when we fill vacant positions. But I am very conscious of the need to fill these positions and even more conscious of the need to fill them with the very best people we can. And we are doing a great deal of interviewing and a great deal of consideration of existing records, and it is not very easy to bring some very good people down to Washington in positions of these kinds, but we are certainly doing our very best, because I know that this is a very high priority. I mentioned one, the program review officer, but he is only one. There are several other high positions vacant that we want to fill, and several other positions with people whom I think it would be desirable to change.

Mr. DINGELL. **Mr. Oden.**

Mr. ODEN. **Mr. Chairman,** pursuing this further for a minute, yesterday, two of your division chiefs in the Bureau of Restriction of Trade testified. Mr. Frank Mayer stated that his fiscal year 1970 allotment of employees was 44, but actually he only had 24 attorneys and four nonprofessional staff members, a total of 28 out of 44. And Mr. Gercke in the Division of Compliance stated that his allotment for

fiscal year 1970 was 33, but he only had 18 attorneys and seven non-professional members. I would assume this runs throughout the Commission, and that the 204 unfilled allocated staff positions are spread out all over the Commission.

Chairman WEINBERGER. They are; yes. And they are positions, secretarial positions, custodial positions, as well as professional positions.

Mr. ODEN. In fact, when you look at your—

Chairman WEINBERGER. There is one other thing I think you should bear in mind that although you have the figure of the forced strength there is a Bureau of the Budget limit on the degree of authorized strength that we are allowed to fill, and our limit is well under our formal authorized strength.

Mr. ODEN. Yes. That wouldn't be 15 percent, though, would it?

Chairman WEINBERGER. No, it isn't that high. We have several vacancies. There is no question about that.

Mr. ODEN. In fact, as of the end of 1969 you had 204 vacancies and at the same time for fiscal year 1971 you are only actually requesting a net increase of eight people.

Chairman WEINBERGER. Well, we are only asking a net increase in the authorized strength of eight employees.

Mr. ODEN. That's right.

Chairman WEINBERGER. But we will not be allowed under current restrictions to fill the full authorization.

Mr. ODEN. It seems difficult to understand how your agency will be able to keep up with the economy growing at the rapid rate and the population increasing. This seems particularly true in regard to your Bureau of Deceptive Practices, which you state in your budget message is the vanguard of the Federal Trade Commission. You note that your applications for complaint in deceptive practices increased in 1969 from 10,152 to 12,560 in 1970, and your estimate for 1971 is 16,250, but you are only increasing, or only requesting a staff increase of 14 employees to handle this great jump plus the new projects that you are creating, like your standards group and more requests for scientific advisers to the staff of attorneys. It is difficult to see how the Federal Trade Commission in its consumer protection activities is going to be able to keep up with the population and economy.

Chairman WEINBERGER. We have hopes of two things. We have first of all the fact that the Commission in December dismissed a great many old and stale cases which seemed to be to the members at that time to be less profitable to pursue than new ones, and this has freed a fair amount of available time among the existing staff members. And we also have high hopes that some of the new people we recruit will through better management techniques be able to secure a higher rate of production than in the past.

Mr. ODEN. That will be reflected I assume from your figures showing that in 1967 in the Bureau of Deceptive Practices 666 investigations were opened, in 1968, it dropped to 333, in 1969 only 192 investigations were opened, and you state that this means that more than 12,000 written pleas for action or assistance were turned down. Yesterday we had testimony from two of your staff members in the Bureau of Restraint of Trade and they said that it is critical right now that the

Commission move in mergers much more vigorously than they are now, but when you examine the requests for additional attorneys and additional professional help it doesn't seem that there is anything they could do except to try to keep their heads above water.

Chairman WEINBERGER. Well, when you examine some workload of some of the attorneys in that Bureau I think you would find that there is room for additional assignments.

Mr. ODEN. Of course, it is just a matter of time as far as moving bodies from one place to another—it is like the old Dutchman and the dike. You stick your finger in one hole and another one pops open and you try to get that one and another one and another one.

You moved one third of your Bureau of Textiles and Furs and tried to spread them out I guess. It just doesn't seem that this could go on for any extended length of time.

Chairman WEINBERGER. Well, as I say we have hopes that when the readjusted workload is allocated to the existing personnel and when the new people we are trying to recruit appear, then we will be able to try to do the job Congress rightly wants us to do.

Mr. ODEN. Isn't this a quite serious problem, and isn't it true that in order to have an effective staff attorney at the Federal Trade Commission it takes a minimum of, say a year of experience, possibly two or three before he is real expert in his field.

The Chairman just pointed out, in fact as I know from experience at the Commission myself, most of the flammable fabrics inspectors are not even attorneys so you won't ever be able to reallocate or reassign those men. You will have to hire the new attorneys. More than likely they will be inexperienced, at least attorneys not acquainted with the statutes that the Commission enforces, and you are just——

Chairman WEINBERGER. What you are mentioning are unquestionably problems of internal management of the agency and the assignment of personnel where their work will produce the greatest benefits and the most effective results. And those are all things that we certainly have in mind and hope to accomplish.

In addition to that, I think we have to bear in mind that we are in the process of looking at the internal organization of the Commission and looking at a broadened field of responsibility for the field offices so as to make a more effective use of personnel directly in the field, and I hope this will have an impact not only on the numbers but on the effectiveness of the work.

Mr. DINGELL. If you will yield, Mr. Oden, I note here the budget makes a statement I think pretty indicative of the problem that you have down there, and I think you ought to devote your severe attention to, and I am quoting from page 75. It says:

During 1969 only 42 attorneys were attempting to handle the entire enforcement caseload of the bureau. The 42 attorneys included two division chiefs, and three senior grade attorneys who assisted them and handled practically no cases themselves.

Chairman WEINBERGER. I am sorry, Mr. Chairman. Which Bureau is this?

Mr. DINGELL. Deceptive Practices.

Chairman WEINBERGER. Thank you.

Mr. DINGELL. Deceptive Practices.

"The number of effective case producers shrinks even more when necessary details to other duties are considered." Then I want you to listen to this language here, and this is a statement of the Commission.

The case producing attorneys labored assiduously during 1969, and have compiled quite a record. They completed about 500 new and auxiliary investigations, secured the approval of 84 complaints, and the issuance of 68 final orders to cease and desist. We can only hope that production at this rate will continue in 1970, since the enforcement divisions have lost by resignation, transfer and illness, ten of their most effective case producing attorneys, and replacements, no matter how talented, require at least a year to swing into full production.

Chairman WEINBERGER. It would be my hope that it won't require a year for the new attorney of the kind we want to recruit to swing into full production.

Mr. DINGELL. Well, you know one thing that troubles me is everybody spends their time knocking the staff and the employees down at the Federal Trade Commission. I don't happen to be one of those.

Chairman WEINBERGER. I am not one of them either.

Mr. DINGELL. I think you may very well have morale problems developing down there in the agency but I have the feeling that it will flow more from the fact that the staff down there doesn't get the kind of support and the kind of acceptance from the leadership that I believe that they are entitled to. Now, my experience with the Federal Trade Commission I can't say is as extensive as yours—

Chairman WEINBERGER. It is much more extensive than mine, Congressman.

Mr. DINGELL (continuing). But I think that you do have an overall superb staff, and you do have a good agency. And I must tell you quite frankly, sir, I greatly resent those critics who take a quick 5-month look at the Federal Trace Commission and then trot back to a lucrative law practice.

Chairman WEINBERGER. I have no doubt whatever that there are many competent, dedicated, able people at the Federal Trade Commission, and part of our task is to identify them and to encourage them with improved management methods.

Mr. DINGELL. As a matter of fact, I would say to you that if you would expect to be effective, you should begin to view your agency as a group of effective producers and to come to the early conclusion that the drones are quite limited in number.

Chairman WEINBERGER. I think this is unquestionably true.

Mr. DINGELL. And I think any other approach from real leadership in your kind of agency is going to result in some pretty destructive effects.

Chairman WEINBERGER. I think there are many good people and the problem is, as I say, to identify them. I think, as unfortunately is the case, there are some who—

Mr. DINGELL. As a matter of fact, I think you got a little bit of perspective here by saying you are going to identify effective people. I think you perhaps ought to have a program to identify ineffectiveness.

Chairman WEINBERGER. Well, the program that I have in mind would identify both, and we would certainly hope not only with those but with the vacant position to secure a degree of improved morale and enthusiasm for the job that will result in some increased produc-

tion by the people who are there as well as the new people we hope to employ.

Mr. DINGELL. I try to approach things positively rather than negatively and I think that this is the way that you are going to be effective down there.

Chairman WEINBERGER. Well, we have some 448 attorney positions, and I am quite convinced that the majority of those are of the same able quality and effectiveness that you have mentioned.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Chairman, following this one step further, have you had any discussions with the younger attorneys on your staff as far as the high turnover rate you have? I know that all Government agencies that hire young attorneys have this problem but at the Commission it seems to be a critical one. Not only do you have trouble finding experienced attorneys, but about the time that you get a young attorney trained, he finds that because of the operation of the Commission or the workload that it is dissatisfying or not challenging and he goes and finds another job, often with other Government agencies. I am wondering if you have discussed this.

Chairman WEINBERGER. Oh, yes, we have a group at the Commission called the Professional Advisory Committee on Internal Management, PACIM I believe—and I have met with them and we have had discussions with them. Some of the ideas that we are putting into the improved capability of the field offices systems from these talks, and some of the younger attorneys have been disheartened as you say by being assigned almost exclusively to investigatory activity rather than the trial of cases in the field, and we hope very much to correct that by the improved capability and the improved assignment of responsibilities to the field offices and to their attorneys. But this is unquestionably a problem. Part of it of course is that an attorney just out of a top grade law school now who has made a fine record can expect to start at anywhere from \$16,000 to \$18,000 a year if he wishes to go into a fairly large city law firm. Well, the Government can't match this. We do have other attractions to the work. And a lot of the younger attorneys at the agency that I have talked to are aware of these attractions. I have high hopes that many of the younger attorneys I have talked to will want to stay with us. And I know that if they do, they will do a fine job.

Mr. ODEN. Of course, this is one point that Commissioner Elman in particular has pointed out several times—priorities, trivia, things such as this.

Chairman WEINBERGER. He has made very useful and very fine suggestions that we have acted on, in many cases designed to improve not only the lot but the kind of work of the younger attorneys so that they will have more enthusiasm.

Mr. DINGELL. I would like to raise a question here I think is pretty relevant. I have heard a number of comments and statements in the press about the FTC beginning to send people out in the field to actually handle enforcement and become a consumer representative bureau, and that you were going to have people in virtually every city in the country to do this kind of work. I am rather curious as to how you are going to accomplish this August goal, carry out in-

creased enforcement and highly complex merger and antitrust cases, and maintain your present level of enforcement in flammable fabrics and to do so within the bounds of your budget. This is a question that troubles me greatly.

If you can do it, you probably will be the next Administrator of the Bureau of the Budget, because you will have solved one of the great personnel problems of this Nation.

Chairman WEINBERGER. We have, Mr. Chairman—perhaps you have not seen a correct interpretation in the press of what it is we hope to do in the field. What we have talked about is the coordination in the field of the numerous governmental activities that are directed toward consumer protection. There are many agencies—

Mr. DINGELL. Now, just a minute. Is that a responsibility that you have under the law? Are you given the duty of getting into administrative functions within the other executive agencies? If so, I would like to have you cite your authority at this time?

Chairman WEINBERGER. No, we are not getting into the other administrative functions of other agencies. Our hope in this is to insure that our own work will be more effectively done if we coordinate and can see that the activities of the Federal, State, and local governments in these areas are coordinated and directed toward consumer protection. Now, this doesn't take any additional manpower. This simply means that the Federal Trade Commission will, as we hope it can, work out through our Federal offices, bring together the representatives of the various Federal, State, and local people to sit in areas and in bodies so that the consumer when he writes to the Federal Trade Commission, for example, and presents a complaint, does not have to be told: I am sorry, there is nothing we can do for you because this is not an interstate commerce matter, period.

What we hope he will be told is while this particular agency to which you have written cannot do anything, there are other agencies of the Federal Government, State government, or local government, naming them, directing the consumer toward these areas where their complaint can be properly taken care of. The Federal Trade Commission has substantial assigned duties in the field of consumer education, and these we hope to coordinate so that the consumers can be advised of the principal types of fraud being practiced and the ways of protecting themselves against them.

I don't envision this as any increase in the power or authority of the Federal Trade Commission. I envision it as a better use of manpower which can result in taking care of consumer complaints by the agency that it is properly assigned to do to see that the consumer gets better service as well as the Trade Commission staying within the bounds of the very considerable authority that it now has.

Mr. DINGELL. I wonder if this is a function that should be carried out by FTC in the field or should it be done in Washington. Are you going to put your emphasis in the field in this or just in Washington?

Chairman WEINBERGER. We are not going to add anything to the total resources of the Commission. We are going to try to redistribute the resources of the Commission so that where the bulk of these consumer complaints and where the bulk of the consumer protection activity necessarily has to take place is serviced by people in those areas.

But I don't envision that this involves any major change in the Washington size of the Commission. I do envision it as improving the capability of the field offices. We have a very substantial number of people in the field, and at the moment their activities are primarily directed toward investigating matters, following which they are no longer authorized to proceed either with proposed settlements or with the trial of the cases that may develop. And I think a more efficient use of their time and of the Commission's resources would be to try to develop a better capability in the field.

Mr. DINGELL. I don't think either one of us are prepared at this moment to discuss the matter in detail, but I have the feeling that if those folks have idle time on their hands they could commence some investigations.

Chairman WEINBERGER. Well, their investigatory work at the moment is rather severely limited by directions from Washington, and what I hope to do is free them so that on their own responsibility and within their own discretion properly supervised in Washington, they will have an opportunity to do just that.

Mr. POTVIN. Mr. Chairman.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Chairman Weinberger, though, I think that in fairness one has to acknowledge that the press in this town at least has carried accounts from both the White House and your agency, and they can be placed in the record if that becomes necessary, that rather had the aura of giving the reader to understand that there were going to be FTC employees walking into stores on main streets pretty much throughout the country, that that was a new aggressive pro consumer protection posture.

Chairman WEINBERGER. I don't see how any accurate press account could possibly have given that impression because the statement I have made repeatedly has been that I thought an improper role for the Federal Trade Commission was on main street or in a supermarket, that what I thought was the proper role was for the Federal Government to try to develop some guidelines and increase consumer education so properly staffed and properly activated State and local units could do this.

I think the very last thing for the Federal Trade Commission to do is to attempt to determine whether, for example, each box of soap which is the example used, is full or half full in each supermarket. So I don't see how any responsible press account could possibly have given the impression you cite.

Mr. POTVIN. Well, the point being of course that you have 194 field attorneys, of whom apparently some 37 were assigned to truth in lending "substantially on a full-time basis." So what you really have is 157 attorneys in the field scattered through a society of some 200 million people, and as you suggest that is a pretty thin line.

Chairman WEINBERGER. Well, it is not only a thin line, I think it is an improper role for the Federal Government to play. I don't think that the Federal Government has any business doing that kind of thing. I think the Federal Government can be of assistance to State and local government, and State and local government as well as the private sector are fortunately taking an increased interest in this field. But the very last thing I would want the Federal Trade Commission

or any Federal agency to try to do would be to get right down into the local stores and the individual local activities of day-to-day business or the day-to-day life of the citizen. I don't think that is the role that Congress intends for the Commission, and it certainly isn't any role that I intended to have the Commission play.

Mr. POTVIN. Well, certainly you are not responsible for some of the newspaper accounts.

Chairman WEINBERGER. No.

Mr. POTVIN. I didn't mean to imply that.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Chairman, I think one point that sometimes is lost when we discuss consumer affairs is the role of the antitrust laws. When you talk about the Robinson-Patman Act and Clayton Act and section V of the Federal Trade Commission Act, when they are enforced vigorously and aggressively the consumer is the one who usually will benefit in the end.

Chairman WEINBERGER. Oh, I agree with you fully. I think the greatest protection to the consumer in the long run is a vigorous enforcement of the antitrust laws, because enforcement is the worst thing that can happen that I know to the consumer. I don't have any doubt about that.

Mr. ODEN. It appears that sometimes, again, noting that statements made in the press can certainly not all be attributed to you or any member of the Commission, the press sometimes in discussing consumer issues focusing in on the Federal Trade Commission talk in terms of money spent on antitrust problems, so much money that should have gone to consumer affairs, and for some reason they seem to lose sight of the fact that antitrust laws do in the long run affect the consumer. In fact they affect him much more than some of the deceptive and false advertising practices and such, at least in his pocket-book.

Mr. DINGELL. Mr. Chairman, I have just one more question here which I would like to raise. You say at page 6 of your very fine statement about the middle of the page, the third paragraph, "Some of the Commissioners are of the view that we are devoting a disproportionate amount of our resources to investigate cases which are subsequently closed by the Commission, and others feel that this investigatory activity has contributed to the enforcement of the Robinson-Patman Act."

Now, I am curious, Mr. Chairman, as to how you and the Commission can possibly lay down guidelines and rules that are going to enable you to sort the sheep from the goats before you commence your investigatory process?

Chairman WEINBERGER. Well, I don't really know that you can, and the paragraph is not designed really to indicate that there is any ability to pick out a specific case and look at it ahead of time and say that we won't look at it because we are going to close it later. I think the idea there that we are trying to convey is that there has been disagreement within the Commission but that some people feel that the mere opening of an investigation even if the evidence does not appear to be there at the time is going by its effect, deterrent effect to contribute to the actual enforcement of the act.

That paragraph indicates, or is designed to indicate some of the disagreement that has been reported as to Commission action in the past. But certainly there is no feeling on my part that we should suddenly decide that we are not going to investigate something because it might ultimately lead to a situation in which we don't have any evidence. But I think there are areas where there are more likely to be violations, certain industries in food and clothing and that kind of thing, that are of particular importance to people generally where you are more likely to turn up some kind of violations than in other broadened industry classifications. And that paragraph certainly isn't designed to indicate any particular way in which we are going to go, but it is designed to indicate to the Congress that this is one of the causes of the disagreement. That after a matter is opened and it has had to be closed, and frequently by unanimous vote of the commission, you have a situation in which some will say, well, you should never have opened it and others will say, well, the very fact that we did has helped. And that is one of the causes or perhaps one of the reasons why there has been some publicly reported disagreement in the past.

Mr. DINGELL. Could I observe this. I have the feeling—I have been a prosecutor, I have been a lawyer. I am also a chemist and I know a little bit about basic research and things of this kind, and I have the distinct feeling that most of these investigations you can't really tell what you will find until you finish.

Chairman WEINBERGER. No, I think that is probably right. You can I think have some idea of the pattern if you have an experience over the years, as many people who do the investigative work do, as to whether or not a particular line of an inquiry in that particular industry is going to prove fruitful or not. You certainly can't make a guaranteed prediction. It is I think very similar to chemical or mineral exploration, something of that kind but you have to have some idea, a general idea where to start because we simply don't have the resources to pursue every trail that looks as if it might be promising.

Mr. DINGELL. I see.

Mr. CONTE. The only observation I want to make is that if you are not confused now you certainly will be when the Appropriations Committee gets through with you. They will think you have got too many employees and too much money.

Chairman WEINBERGER. I think I should have studied more carefully for today than for Monday.

Mr. CONTE. I hope you don't walk out of here today on Cloud 9 in terms of backing for more funds and more staff and go into the committee Monday like that.

Mr. DINGELL. You know, my views in this area are at variance with the Appropriations Committee. Happily, I am able to tell you that my views prevailed on several matters last year. I am not sure that they would prevail on this.

Mr. Chairman, we do thank you for your presence and your very fine statement. I don't want you to feel that sharp questions from the committee indicate any lack of respect or affection for you or that they indicate any desire that you should be less than fully and completely successful in your new and very difficult undertaking.

Chairman WEINBERGER. Well, I appreciated very much the spirit of the reception I have had this morning and the very helpful inquiries of the committee. I think we are all interested in precisely the same goals, and I need all the help I can possibly get.

Mr. DINGELL. Well, we certainly thank you.

Chairman WEINBERGER. Thank you, sir.

Mr. DINGELL. The committee notes that an old and valued friend of the Chair and of this committee is present with us, Commissioner MacIntyre, Commissioner, would you like to proceed with your statement at this time or would you like to defer to a time later when it would be convenient for you?

Commissioner MACINTYRE. To what time, defer to what time?

Mr. DINGELL. Well, to a time that the staff could work out which would be mutually satisfactory to you?

Commissioner MACINTYRE. I believe it would be better to defer it perhaps.

Mr. DINGELL. I think in view of the lateness of the time it might be well for us to do so. I would be happy to hear you if you would like to be heard. But I very much doubt that we could give you the kind of courteous and gracious hearing that you are certainly entitled to and that I am your friend of longstanding would like to afford you. If we could, Commissioner, if we defer to a time later, I think it might be helpful.

Commissioner MACINTYRE. All right.

Mr. DINGELL. Yes. Gentlemen, we wish to thank three members of the Commission, the Chairman, Commissioner MacIntyre, and, of course, our friend Commissioner Elman for their presence. Gentlemen, it is always an honor to have you before this committee, and we thank you very much.

If there is nothing further to come before the subcommittee, we stand in adjournment until the call of the Chair.

(Whereupon, at 12:15 p.m. February 27, 1970, the subcommittee adjourned, subject to the call of the Chair.)

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

TUESDAY, MARCH 3, 1970

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT.
SELECT COMMITTEE ON SMALL BUSINESS,

Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2359, Rayburn House Office Building, Hon. John D. Dingell, chairman of the subcommittee, presiding.

Present: Representatives Dingell and Horton.

Also present: Representative Hungate of the full committee, Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

This morning the subcommittee is honored to have two distinguished members of the Federal Trade Commission as our guests for such statements as they choose to give.

Our first witness is the Honorable Mary Gardiner Jones.

Commissioner Jones, we are very honored to have you with us and the Chair is well aware of your distinguished work with the Commission and we are certainly privileged to have you with us this morning.

Before you proceed, if you will identify the gentleman with you—I understand he is your assistant.

Commissioner JONES. That is correct, Congressman, thank you very much.

This is Mr. Edward Heiden. He is my economic adviser, from the University of Wisconsin. He is on leave, and on my staff for the year.

Mr. DINGELL. Mr. Heiden, we are happy to welcome you.

The Chair recalls at a time past that you employed as legal adviser a very dear friend of mine by the name of Grundman.

Commissioner JONES. That is correct.

Mr. DINGELL. Who is now successfully practicing law down in the State of Texas.

Commissioner JONES. That is what I hear from him.

Mr. DINGELL. I hear from him occasionally, and his youngster, who is my godson, is doing very well.

Commissioner JONES. It was very good to have him; I am always sorry to lose my assistants so quickly.

Mr. DINGELL. We are certainly delighted to have you with us this morning, Commissioner.

**TESTIMONY OF HON. MARY GARDINER JONES, COMMISSIONER,
FEDERAL TRADE COMMISSION, ACCOMPANIED BY EDWARD J.
HEIDEN, ECONOMIC ADVISER**

Commissioner JONES. I would like very much, with the committee's permission, to speak briefly and orally this morning, and then submit to you a more formal statement which I have, but have not yet put in final form.

Mr. DINGELL. This is entirely appropriate, and without objection it will be so done, and leave is given to submit the statement in such fashion and at such time as you see appropriate.

Commissioner JONES. Thank you very much.

(The statement follows:)

**STATEMENT OF MARY GARDINER JONES, COMMISSIONER,
FEDERAL TRADE COMMISSION**

Members of the Committee—I am delighted to be here and to participate in what I regard as very important and—to the Commission—very helpful hearings on the Commission's enforcement of the Robinson-Patman Act.

I am a strong believer in that Act. It strikes at pricing conduct which can have severe adverse competitive impact. It is an important part of the antitrust laws which are designed to promote the welfare of the consumer by preventing the imposition of unlawful restraints on competition. It is this competition to which we look to ensure the consumer the type and variety of high quality goods that *he* wants at prices that he can afford.

If the competitive system fails to operate effectively, the consumer is the ultimate victim.

The Robinson-Patman Act fosters the kind of competition that benefits consumers by preserving equal competitive opportunities for small businessmen. Frequently it is the small specialized seller that is best able to cater to the individual tastes and desires of different population segments while the national company more typically serves the so-called average consumer. Frequently—also—innovation and creativity is the forte of the small businessman rather than of the large multiproduct national corporation.

On the other hand, neither the Robinson-Patman Act itself, nor the Commission in its enforcement of that Act, is concerned with maintaining inefficient businessmen—be they small or large—in business. The Act addresses itself to the need to ensure that all competitors start out on an equal footing and are not hampered by unfair exercises of market power unrelated to competitive efficiency.

The Robinson-Patman Act also benefits the consumer by focusing on the long range benefits of price competition in our economy. If special price concessions are made to a few favored purchasers, this does not necessarily mean—as many assume—that the consumer will automatically reap the benefit from them in the form of lower prices—either immediately or over the long term. There is no assurance that such price cuts will be passed on to the consumer by the favored purchaser. Moreover, even if they are passed on initially, there is no assurance that the lowered retail prices will continue in that market. Where illegal price discriminations are engaged in, the likely consequences that competitors will be driven out and concentration increased, or that competitors will become docile, content to follow the dominant more powerful market leader with respect not only to their prices but even perhaps with respect to the services they offer and other aspects of competition. Either way competition has been diminished and the consumer is the loser.

I would like to make just a few brief comments on the Commission's enforcement of the Robinson-Patman statute.

In the first place I am not convinced that the Commission's enforcement of the Act has been as deficient as the general criticism would indicate. Our enforcement efforts may not have been enough. They may not have been directed at the industries most in need of corrective action and they may have been too scattered in their impact in some areas. But I have yet to see evidence that either the Act

or the Commission's enforcement of it has impeded competition or had other anticompetitive consequences.

In the second place, whatever shortcomings the Commission's enforcement efforts may have demonstrated, it is essential that we recognize that these shortcomings are the Commission's responsibility.

It is the Commission which must set enforcement policy and establish guidelines for the staff. If the staff has directed its investigatory resources at the wrong industries that is the Commission's fault, and mine as a member of the Commission.

I think in this area the Commission has not done as much as it could and should have. The Commission has had no real policy or program planning since I have been a member. We have not sat down and reviewed with our staff the industries which seem to be undergoing the greatest competitive stress. We have not analyzed conditions in industries which seem to be moving in the direction of concentration to determine whether the causes are structural or behavioral and how we should pursue them.

I believe that the Commission must take affirmative steps to rectify this aspect of its enforcement activities as quickly as possible. We should hold hearings and meetings with problem industries. We should issue reports on our views of industry developments and what we believe to be the causes, invite comments and undertake analyses. We should undertake to identify competitive problems early and then establish substantive priorities for our staff to follow in directing their investigative resources. And we must coordinate our merger and Robinson-Patman enforcement efforts where this is appropriate. Finally, we must follow up our enforcement work to see what effect we are having.

In short, Mr. Chairman, we must immeasurably improve our planning and enforcement work or we will fail the small businessman and we will fail the consumer.

It is obvious that no institution in our society is perfect. Every institution must re-examine its own performance with a view to improvement. In addition to perfecting our program planning activities, therefore, I wholeheartedly endorse the unanimous Commission statement presented by Chairman Weinberger on Friday, and enthusiastically support the study which the Commission is making to evaluate its own enforcement of the Robinson-Patman Act.

I would like to turn now to a little closer analysis of some of the factors underlying effective Robinson-Patman enforcement policy, as I see it.

We must be constantly aware that, unlike some other forms of business conduct which do violence to competition, the anticompetitive effects of price discriminations are frequently indirect and long range. Critics of Robinson-Patman say that discriminatory pricing benefits the ultimate consumer through permitting a favored buyer to pass on lower prices, but they neglect to mention that over the longer run such discrimination may have just the opposite effect by eliminating from the market those non-favored competitors who, though equally efficient, are simply not in a powerful enough position to command the discriminatory favors received by their more amply endowed competitors. Elimination of such viable smaller competitors increases market concentration and augments the monopoly power of the favored buyers, leading in the long run to higher prices. Likewise, where price discrimination is rampant, it can undermine one of the essential structural props on which price competition depends by causing non-discriminating suppliers and non-favored customers simply to cease trying as hard in the competitive struggle. It can cause them to opt instead for diminishing the level of price warfare and reaching mutual accommodation with those favored competitors who have used discriminations to obtain or enhance their own monopoly power. Likewise, the prospect of competing with a power buyer who obtains special prices or of bargaining with suppliers who engage in selective discriminatory price cutting can make it difficult or unattractive for new entrants to come into a market. Further, it can cause small, undiversified or local companies to seek out stronger and larger partners through merger so as to be better able to engage in retaliatory pricing tactics.

Given these long run anticompetitive effects of letting price discrimination run rampant in a market, our Robinson-Patman enforcement should concentrate on those industries where the anticompetitive effects of such discriminatory favors are most widely felt. Continued focus on possible discriminatory practices in newspaper and television advertising rates is clearly in order, since discriminatory rates to large advertisers cause entry barriers to be raised and efficient

small competitors to be disadvantaged in a wide variety of industries that rely heavily on the use of such advertising. Emphasis should continue to be accorded to the preservation of competition in the many industries which are subject to the market tactics of power buyers. In addition, we must focus our efforts on industries and markets where significant cumulative volume or quantity discounts exist which make it difficult or impossible for smaller but equally efficient limited line suppliers or customers to enter or compete vigorously with larger, full line firms that are able to give or obtain the larger discounts.

The Commission must also pay much more attention than it has in the past to precisely what pro-competitive results vigorous enforcement can be expected to have in a given case. In each case it must define precisely how the conditions necessary for vigorous competition have been undermined by particular discriminations; it must determine what parties have been injured and how they have been injured. It must ascertain how potential competitors have been affected, and how ability or desire to compete might have been specifically dampened; it must evaluate how curing the discrimination can be expected to improve the competitive performance of the industries affected by it.

In these connections the Commission must consider whether the competitive problems of an industry might not be better dealt with by concentrating on structural characteristics of the industry, rather than by attacking behavioral aspects; or by attacking behavioral characteristics other than price discrimination; or by a multi-faceted antitrust attack on several aspects, rather than just on the basis of price discrimination alone. For example, an active anti-merger policy in certain industries like food retailing has been found to be an effective complement to a strong anti-discrimination stance in dealing with power buyers, thus indicating that the joint use of both structural and behavioral antitrust tools on the same industry may be necessary if competition is to be well preserved in "problem" industries.

Thus, before committing any sizeable resources to a given Robinson-Patman matter, the Commission's staff should probe the relevant structural and behavioral characteristics of the industries affected by the discrimination in order to discover and weigh the probable pro- and anticompetitive effects of proceeding with the case and of alternative approaches. Questions concerning the level of existing concentration, conditions of and barriers to entry, amount and type of product differentiation, type of pricing behavior in the industry (price leadership, competitive price jousting), and modes of distribution strike me as immediately most relevant. Each industry and market however will require its own particular specialized approach in light of industry conditions.

Lastly, I think, in approaching the task of enforcing the Robinson-Patman Act—and all of the antitrust laws for that matter—there is a need for something more than merely avoiding anticompetitive pitfalls and selecting industries and markets where the positive effect of enforcement on price competition seems most obvious. The enforcement official must remain constantly aware that even in the best of all possible worlds antitrust enforcement simply cannot guarantee that firms will compete on the basis of price. No amount of enforcement of existing law can decree that firms will start to compete on the basis of price, when they have long been accustomed to competing on some non-price basis such as slight variations in product characteristics, or trying to be first with new product or technological developments, or by means of research and development, advertising, or promotional outlays. No legislation at present can decree that businessmen in a close-knit rigid-price oligopoly cease and desist from living the quiet life of noncompetition with each other and henceforth compete vigorously.

What vigorous enforcement can do, however, is to establish or maintain those market characteristics which are most conducive to a price-competitive atmosphere. By doing all that can be done to maintain the existence of numerous competitors and to limit the market power of any one of them, by maintaining ease of entry, and by doing nothing that discourages the competitive willingness of individual firms, vigorous and intelligent enforcement of the antitrust laws, including the Robinson-Patman Act, can, I believe, lead businessmen to turn to price as a vehicle for competition. To do this, while it is a far cry from the guaranteed price competition that so many seem to assume is the automatic result of proper enforcement, is nevertheless a significant achievement.

With this warning against excessive optimism in evaluating the potential of the Robinson-Patman Act in stimulating price competition, I am strong in the belief that the Act is a valuable weapon in the arsenal of antitrust policy. If

it is used with full awareness of the competitive facts of the markets where price and promotional favoritism are important, it can make, as it has doubtless made in the past, a most significant contribution to effective antitrust enforcement—a contribution that fully warrants the commitment of sizeable resources of the Commission.

Commissioner JONES. Thank you very much.

What I want to stress this morning to the committee is the way in which the Robinson-Patman Act affects the consumer.

Obviously, the act strikes at the type of pricing conduct which can have very severe anticompetitive implications. As you well know, the antitrust laws are basically designed to promote the welfare of the consumer. Any kind of activity which will strike at the competitive system is going to be striking at the consumer.

The consumer will be the first victim of anticompetitive conduct. This is something I think we tend to forget about the antitrust laws. Yet promotion of consumer welfare, is, after all, their very primary objective.

Thinking of the antitrust laws from the consumer's point of view, it is important to recall that the consumer wants basically in the marketplace the greatest diversity of goods of the highest quality and at the lowest price. In this sense, the Robinson-Patman Act is, I think, of all the antitrust laws, the one that is most directly connected with the needs and desires of the consumer.

Something I think we forget sometimes when we are considering the kind and variety of goods the consumers want is the role small business plays in being able to cater to the kind of diversity of taste consumers have. The national companies, perforce, must settle and gear their production to the needs of the so-called atypical average consumer.

It is the small firm that can in fact respond to the diversity of taste of the small consumer, the smaller minority. I understand, for example, the average consumer is still a minority but the largest minority, let us say roughly 30 percent. The other minorities within the population run roughly 10 to 20 percent. It is the small businessman who is most able to adapt himself to the needs and desires of these smaller population segments, particularly in the retail field, in the apparel field, to a certain extent, and of course in the specialty foods as well.

So, to the extent that the Robinson-Patman Act has as its objective to keep in business the viable efficient small businessman and not have him pushed to the wall because of the larger resources of his competitors that he simply cannot meet, the act will directly benefit the consumer.

I know the criticism that has been made of the act that it tends to rigidify competition and prices. When people talk about price discrimination and price differences as being the only way that companies can try and experiment with price reductions, I think that it is often forgotten that there is no assurance to the consumer that these so-called lower prices are going to be passed on to the consumer.

So often people criticize the act because it has the effect of depriving consumers of lower prices. Nobody pays any attention to the fact that there is no assurance that the price cut has been passed on and indeed in many instances, in a lot of litigated cases we see that in fact it has not been passed on.

Mr. DINGELL. One point I think you made very well here, Commissioner, is the fact that the law really does not prohibit experimentation, it prohibits experimentation which is discriminatory in character.

Commissioner JONES. That is true.

Mr. DINGELL. As long as experimentation is fairly and properly done, there is no denial of a right to do so under the law.

Commissioner JONES. Absolutely, and yet I bear so often this criticism being made. I have yet to see a concrete factual situation which anybody can point to and say—in that instance this man would have tried a test marketing, he would have tried an experimental lowering of prices but because of the Robinson-Patman Act he could not. I just have never seen it. Maybe it has happened, but I haven't seen it.

The other point we ought to keep in mind is not only there is no assurance that the so-called lower price is going to be passed on, but I think we have to keep in mind the long-range benefits of competition versus any kind of short-range lowering of pricing levels. Even assuming that a price difference was in fact passed on by a retailer, if in fact it has the kind of adverse effect on competition, which is prohibited under the law, the immediate lowering of the retail price has not done the overall competitive system any good.

The temporary lowering of a price level, if in fact it has injured competition, which is the only thing the law is concerned about, then that individual consumer is not in the long run going to benefit by that price cut. Either because competitors will be driven to the wall or more typically—I think we don't see so many people driven out of business—we will see them becoming very docile. Competitors quickly recognize the real power in the market and if they become docile competitors then again we have lost the kind of benefit from competition which we need. Price competition is only one form of competition. Companies also compete in furnishing services, in the diversity of goods, the handle, and if they are following the leader and that leader is that power market participant, I doubt very much that you are going to get that kind of innovative competition.

I have seen it happen too often. I have seen it in the price-fixing cases, in the equipment industry, where the market didn't want to follow the leader. The major company said, "Do you want to play games? I'll show you." And down would go their prices until everybody was caught in the mesh. Once they were able to go back up again, the companies had learned the lesson. Everybody became very docile and you didn't have any serious competition.

So much for the Robinson-Patman Act in that aspect of its basic objectives and how it works for the consumer.

Just a very brief remark in terms of some of the criticisms that have been made of the Commission for its enforcement of the act.

I feel very strongly, regardless of how well merited that criticism is or is not, we all ought to be clear that the criticism must be directed at the Commission. I think it is unfair to direct it at the staff. To my way of thinking, if the Commission has failed in program planning, of its overall anticompetitive, antimonopoly work, if it has failed to give the staff guidelines, that is the Commission's failure not the staff's.

If the Commission has been delinquent, then as a member of the

Commission, I share in that blame. I do not think it is fair to put any onus on the staff because of the cases they have brought. If the staff has pursued the wrong kind of cases, then it is our fault for not giving them the kind of guidelines which would lead them into more profitable paths.

Mr. DINGELL. Commissioner, I want to say one thing: I have sat in this chair now for a number of years and I have worked with the Federal Trade Commission for many years, both on this committee and other committees.

I have now sat through, I don't know, many hundreds of pages of testimony, and many thousands of words, hundreds of thousands of words of testimony.

I must tell you that on the basis, at this time, on the basis of what we are able to ascertain, having heard now the new Chairman of the Commission, having heard the members of the Commission over the years, that I cannot fairly direct criticism at the Commission.

I think that as in every human institution, it is possible to say that they probably could have done a better job, and I suspect that as in other Government agencies we might find some soft spots in the agency, but I have to tell you, on the basis of a long and careful scrutiny of this matter, and a most prayerfully made study, that I am satisfied the Commission on the whole has done an extraordinary job and I wish to reiterate to you, both with regard to your personal endeavors—and I say this with a great deal of respect and a very high regard—and with regard to your colleagues on the Commission, I think you and the Commission have done an extraordinary job and I think that much of the criticism that has been leveled at you in what I regard in some cases as a most unfair, sneaky, underhanded fashion by certain groups of people is entirely wrong.

It is, in large part, without factual basis and it is to a degree based on personal spite and I think upon some very narrow scrutiny of the very diligent efforts of a very dedicated and fine agency, and a dedicated and fine group of people on the Commission and on the Commission's staff.

Commissioner JONES. I appreciate that, Congressman, especially coming from you and from your committee, which has, with all humility, far more experience in the Robinson-Patman field than the Commission and I have. I am in that sense a much more recent member.

I do think, as you say, in any institution, it may have some soft spots. Every institution is capable of improvement. My hope is that as we start to build a program policy planning office, we will in fact be able to plan more self-consciously and to pinpoint in advance the kinds of industry that we ought to be directing our major attention to. I hope that out of that office, when we get the kind of studies and reports that we need in order to do this, we will be able to look at an industry, and determine whether its competitive problems seem to be structural, or behavioral, or perhaps a little of both. Then we will be able to coordinate our resources and attacks so that we will have, and perhaps be able to give, a more effective set of guidelines to our staff. I think that we can do a better job than we have. I would hope that we can meet with industry groups in the communities.

I hope that through this kind of program planning we can in fact start making tentative industry studies. We can, I hope, have meetings with industry people, and with academia, so that we can get the benefit of the kind of expertise that exists outside the agency.

I think the world has become so complicated today that five members of the Commission really can't just sit with their staffs and determine what are the major problems of the economy. I think we need to move out into the community and get as much input as possible into our own thinking.

So my hope is that in the next decade of the Commission, this is the way we will move. I hope that we can in fact improve our performance and make sure that, if we have this kind of criticism again, we can answer it chapter and verse in terms of exactly why we did what we did, and demonstrate that our actions conformed to a consistent program well thought out in advance and responsive to the best thinking we could muster.

The study that the chairman told you about when he testified is certainly a first step. We ought to analyze the kind of effects our orders have had in the past. This is one of the problems all Government agencies have: how to measure their performance. It is very difficult to do, but, with the development of the new techniques that have been coming out, we will be able to make some measurements. I hope that our study will enable us to do this.

Mr. DINGELL. Of course, you are speaking precisely of something that I have been nagging every one of the regulatory agencies in town about, and that is, the planning ahead functions, what do they have in the way of analyzing needs, to establish a cohesive and organized program. I think in fact that the Federal Trade Commission should be doing it is a particular credit to it. In all of the Federal regulatory agencies, I know of none that does this and I know I have had some very lengthy correspondence with every agency in this town on this particular point.

Mr. Potvin wanted to ask you a question.

Mr. Potvin. Thank you, Mr. Chairman.

Commissioner, when your new Chairman appeared recently, he said principally, I think, two things, really, that he was going to enforce the Robison-Patman Act, and described this study.

Inexplicably some of the trade press interpreted or perhaps chose to interpret, I really don't know, that he meant there would be a delay of a year in Robinson-Patman enforcement while the study was being made.

Now, I hope it is not inappropriate to ask whether that was a consensual statement—I must say it was very clear to me—

Commissioner JONES. Mr. Potvin, I thought he made an absolutely explicit statement to that effect. But, if not, you are quite right, the Commission could not possibly and has no intentions to suspend its operations and start studying. That would be—

Mr. Potvin. I detected no ambiguity there.

Commissioner JONES. No, sir, no.

Mr. Potvin. Well, the pink sheet being distributed this week and I have one before me which says:

R-P enforcement suspended for one year.

Commissioner JONES. It is ridiculous.

Mr. POTVIN. That was my impression, and I intend to see that Mr. Switt, the editor of that, gets a copy of the transcript, just as soon as we can.

Commissioner JONES. I must state very clearly that this was never in anybody's mind and we do not intend to suspend any kind of enforcement.

Mr. POTVIN. Thank you, ma'am.

Commissioner JONES. Well, Mr. Dingell, that really ends the few oral remarks that I had to make. I thought it would be appropriate to make them this morning and if there are any other questions that anybody has to ask, I would be most happy to try to answer them.

Mr. DINGELL. I think you have been very helpful to this subcommittee, and I wish to express my personal thanks and those of the committee. Our colleague, Mr. Hungate, is here, and the Chair is happy to welcome him for any questions he may have of Commissioner Jones.

Mr. HUNGATE. I have no questions at this time, thank you.

Mr. DINGELL. Mr. Oden?

Mr. ODEN. Thank you, Mr. Chairman.

Commissioner, I only have one brief remark that I would like to make.

When the Chairman was here we discussed the budget at length, because no agency can actually do a full job unless it has the proper resources and manpower that is necessary. In the budget for this coming fiscal year there is only a request for an additional \$375,000 in funds, and approximately half of that would go into pay increases that have already been set and nothing can be done about them.

I wonder, particularly when you look at the Bureau of Deceptive Practices and you see the enormous amount of work that they have and the projection of future work, it is hard to see how an increase of 14 employees in that bureau could possibly keep up with the amount of work that they have.

Commissioner JONES. Well, you put your finger on the perennial problem. Everybody needs money and wants more, yet we have to recognize that we fit into a total governmental scheme. My feeling about this is mostly that I think we ought to concentrate in the next year on making sure that we are using as effectively as possible the resources which we have.

As we move more self-consciously into this program planning I think we will then be able to be much clearer to Congress on just exactly what programs we had to eliminate because we didn't have the resources, why we think that program ought to be adopted, what kind of extra resources we think we need for it.

Then I think we ought to come back to you. It will give you an opportunity then to see not that we need just more bodies and more money, which everybody knows everybody needs, but to be able to translate it into a specific substantive program.

We are not in shape to do that right now. I think we will be in shape to do that for you next year and then I think we probably will come back. I will never say we don't need more. But I will say that if we get what we have asked for this year our particular needs at the

moment are to start learning how to be effective with those resources that we have. Then I think we will be in a position to come back and say—we need more for this, and we need more for that, and you will be in a position to say—I don't think you need to be doing this, or it is not important, or you should not do that.

Mr. ODEN. Speaking of examining priorities in allocating resources, I think when Chairman Weinberger was here, the Chairman mentioned with pleasure the fact that the Commission in its budget request has stated that they are going to create a new division or task force in the Bureau of Deceptive Practices to cover consumer product standards, which this committee has had some difficulty in trying to understand how the Federal Government can cohesively examine the effect that a Federal-sponsored standard has on consumer interests and whether it is actually protecting the consumer when it is promulgating standards.

I think the Federal Trade Commission can certainly play a great role in advising other agencies when they promulgate these standards, as to what effect they are going to have on the consumer and on industry.

Commissioner JONES. This is very much my feeling in the area of standards: We are not an agency that can promulgate standards since we do not have that type of expertise. I think, however, we can indicate the areas where product standards would be most useful. I think mostly in terms here of performance standards and uniformity of terminology so that the consumer can compare particular characteristics of products.

Here I think we can play a real role, first to give whatever the standard-making authority is, some insight into where the greatest need is, what is it the consumers are most concerned with. Then I hope also we can play a role in terms of making sure that the consumer's voice is heard in those standards-making procedures.

I have suggested, for example, that I think there should be an appeal from an initial standard which is promulgated, an appeal on the ground that it does not adequately protect the consumer's interest. I would like to see that kind of appeal go to the Federal Trade Commission. I think you can have an appeal urging that if adopted it will hurt competitors. These appeals could go to the Department of Justice, or the Federal Trade Commission, for appraisal. In this way the antitrust and consumer aspects of those standards would in fact be submitted to some kind of governmental regulation with the standards-making itself would remain with private industry where the greatest technical expertise exists.

The technical end of it I think we have to leave to industry. I don't think any of us, aside from the Bureau of Standards and possibly the Department of Commerce, have much input on the technical end of things, such as the type of standard or the reasonableness of a proposed standard. But, I think we have a real role to play in defining the areas in which standards can help consumers or in which their existence will enhance the competitive vitality of an industry segment by helping consumers to be more knowledgeable. As soon as you get more knowledgeable consumers, you are going to have more demand for the better quality products or the better advertised in the sense of more informatively advertised products. As a result the competitive system will work better.

I think that is the area we should move in. As another effort we are moving in this area. We now have a proposed trade regulation rule in textile fabrics to disclose certain types of information, while the information does not relate to technical standards, it does go to performance. The required information relates to how the fabric has to be cared for so that it won't shred or shrink, or all the other things that are concerned there.

We have also moved into the area of light bulbs, requiring the disclosure of the standard life of a light bulb and what the various characteristics mean when they are advertised. These are a few of our efforts to use our jurisdiction where we can in this general area of standards, and product information I am fully aware that in the basic area of standards formulation we have not the expertise.

Mr. ODEN. We certainly don't expect on labeling an explanation of how to care for garments.

This is a critical problem in this country and in January I think, Bess Meyerson or Betty Furness on the "David Frost Show" was speaking on this specific point. She asked the audience what experiences they had had with fabrics and how to care for them and the entire audience had problems with how to wash or dryclean or how to take care of these fabrics.

Commissioner JONES. They are real needs. I have done a lot of speaking to business groups, as you well know, and I think they now finally have realized that not only is there a real, genuine demand for information, but they are beginning to realize it has some competitive advantages, too.

Now, once business can really appreciate the competitive significance product information disclosures, the Government agencies will not have as big a job to do to try to pry that information out. Once it gets competitive, then I think our job will be to steer it into disclosure of the most meaningful information. I can even see this developing now in the advertising fraternity, advertisers are beginning to criticize themselves and talking about wasting their advertising budgets and time on frivolous, meaningless claims. They are beginning to give us some of the product information that the consumer needs and wants and which can do us some good.

I think that the thing is starting to move and the role of Government is pushing that as much as we can, and where it is necessary for quality.

Mr. ODEN. Thank you, Commissioner.

Mr. DINGELL. Mr. Potvin.

Mr. POTVIN. Miss Commissioner, one of the matters our subcommittee and your agency has each been considering in their own way is the question of sweepstakes. If it is not inappropriate, I would like to ask what the thinking of the Commission is at this point. There had been indications that a formal proceeding was perhaps in the near future. Certainly we would not want to commit an impropriety, but to the extent it is appropriate, could you indicate the road ahead on sweepstakes?

Commissioner JONES. Yes, and I am going to do it very generally, and please forgive me, you will understand why.

The Commission has that now before it. I would think, I am trying to reach out in terms of timing, but shortly we are going to be announcing a decision on it. I don't think I should go further than that, as to the kind of approach we think we are going to take.

Mr. DINGELL. The Chair expressly wishes you to know, and I am sure you do, Commissioner, it is not our purpose to in any way or in any fashion to try to influence the Commission. We might criticize you after you do it, but never is it our purpose to breach the wall that was established, I think wisely, in the Pillsbury case.

Commissioner JONES. Thank you.

Mr. DINGELL. Mr. Hungate?

Mr. HUNGATE. No questions, thank you.

Mr. DINGELL. Commissioner, it is always a privilege to see you up here. I am sure you know we try to be vigorous and protect the public interest, and also try to be fair in recognizing distinguished and fine and noble public servants.

I just want to pay tribute to you for your very distinguished and dedicated record on behalf of the public.

Commissioner JONES. Thank you, Congressman. It is always a pleasure to appear before your committee.

Mr. DINGELL. Mr. Heiden, we are certainly privileged that you have been here with us this morning, and thank you for being here.

Mr. HEIDEN. Thank you, Mr. Chairman.

Mr. DINGELL. The Chair is happy to welcome the distinguished and valued friend of the subcommittee, also an alumnus of this committee, back to the committee this morning, our old friend, Everette MacIntyre.

Commissioner, we are certainly privileged that you should be here with us. The Chair notes that you have a member of your staff with you this morning and if you would, for the purposes of the record, identify him, we would be most pleased to hear from you.

TESTIMONY OF HON. EVERETTE MACINTYRE, COMMISSIONER, FEDERAL TRADE COMMISSION, ACCOMPANIED BY THEODORE von BRAND, ATTORNEY-ADVISER

Commissioner MACINTYRE. Thank you, Mr. Chairman and members of the committee.

Mr. Theodore von Brand, attorney-adviser of the Federal Trade Commission is with me. He is at the present time assisting me in my office.

Mr. DINGELL. Mr. von Brand, we are certainly happy to have you with us this morning.

Mr. von BRAND. Thank you, sir.

Commissioner MACINTYRE. Mr. Chairman and members of the committee, if it were possible to leave the case of the Robinson-Patman Act and its value to the consumers and the public interest on the statements of Commissioner Jones which I have just heard, I would be very willing to do that.

However, you did ask me to appear, and I was here last Friday, as you know, and had handed you a copy of a statement that I would propose to make, and if you would indulge me at this time, I would undertake to present that to you.

Mr. DINGELL. Mr. Commissioner, the Chair recalls your very patient waiting, for which we thank you and express our apologies, and we certainly would be happy to recognize you for this statement.

Commissioner MACINTYRE. I welcome this opportunity to appear before your subcommittee to present my views on the place of the Robinson-Patman Act in the antitrust scheme. And, I would like to say that the views I hold are those that I accumulated and firmed up, based on something like four decades of work in the area of antitrust and trade regulation, the experience and knowledge that I have gained really serve as the basis for what views I am able to give you today.

Presently, the assumptions underlying the act, Robinson-Patman Act, and the Commission's enforcement of that law are both under attack, as you have noticed. The issues raised are fundamental to any assessment of antitrust, for price discrimination "frequently determines whether individuals, businesses, and regions will prosper or decay." As a result, public policy in this area is too critical to be resolved solely on the basis of value judgments divorced from empirical data. Nevertheless, this seems to be precisely the direction of the current challenge to the enforcement of the price discrimination law.

Congress, in enacting the Robinson-Patman Act, "hold steadily as its guiding ideal the preservation of opportunity to all usefully employed in the service of distribution" in line with their ability to serve the public with real efficiency, as well as the preservation of the public's freedom of choice in buying and selling.

Of late, these objectives have frequently been ridiculed as smacking of a more naive era. Nevertheless, the goal of freedom of opportunity for the efficient, including small business, has been frequently restated by the Congress. Consider, for example, the Small Business Act. There the Congress declared the public policy to be that the Government should aid, counsel, assist, and protect, insofar as possible, the interests of smallbusiness concerns in order to preserve free competitive enterprise.

Now, this is the reiteration of what Congress had done previously, and yet what is declared to be the public policy and the law is nevertheless in question by particular groups, as noted by the chairman of this subcommittee a little earlier this morning.

Now, the objective has been judicially stated in the case of section 7 of the Clayton Act and the Sherman Act. Significantly, therefore, this is not an antitrust aberration unique to the Robinson-Patman Act as some of its detractors assert. The goal of opportunity for the small as well as the large, moreover, is not an ignoble one. It should not be obscured by over-reliance on economic arguments not solidly grounded in fact, and which simply do not take into account the legislative intent underlying the price discrimination law.

Ironically, criticism of the alleged anticompetitive effects of the Robinson-Patman Act seems to be increasing at a time when the Commission's enforcement efforts under the law have sharply diminished.

In that connection, I would like to cite the statistics which you have received and which were attached to the statement of the Chairman, Chairman Weinberger, of the Federal Trade Commission.

Also in footnote 5 of my statement, you will find additional statistics on pages 3 and 4 of my statement.

Disagreement within the Commission, echoing the attacks on the statute from without, has in recent years precluded aggressive enforcement of the act.

Now, in that connection I would refer to public speeches that have been made, as well as statements which have been made in opinions, particularly dissenting opinions to Commission's actions down over the years. And when I make those references, Mr. Chairman, I don't want any characterization of mine to be taken by you for any of those things that are said, I would rather for you and your committee to look to the record on these things for the purpose of determining in your own minds what language should be used to characterize what has taken place and what has been said about this law.

And, while I am on that subject, I want to say this—over the past 7 or 8 years there have been quite a number of very important Robinson-Patman Act cases decided by the Commission. I think as to most all of those, particularly those in the 2(a) category, you will find that Commissioner Dixon wrote the majority opinion, in practically all of them. I don't believe but as to one of those I had any failure to agree with the opinion, and that was in the Dean Milk. I agreed with the result but not with everything that was said in the opinion and not with everything that was said in the order, but I did agree for the reasons I have stated in my statement at that time with the results in the case.

I do think that Commissioner Dixon is entitled to a lot of credit for the manner in which he has applied his shoulder to the wheel in the enforcement program for this particular law.

It is fair to say that, at present, for an innovative and sympathetic interpretation of the law we must look to the Supreme Court and to the private bar in treble damage actions, in a large measure. Consider, for example, the *Utah Pie* and the *Perkins* cases. It is safe to say a majority of the Federal Trade Commission could not have been mustered at the time those cases came out for the result reached by the Supreme Court in those cases, and again I refer you to the rational stated by the Supreme Court and ask you to compare that with the statements of various members of the Federal Trade Commission, for the purpose of your determination as to whether what I say has validity.

The disturbing aspect of much criticism of the Robinson-Patman Act enforcement is that it is simply devoid of empirical content. The critics quote one another approvingly but fail to articulate the factual data on which their case rests. For example, how is one to come to grips with an argument relying on sources so inchoate as an "impressive body of literature"?

Characteristic of the current challenge to the act is the following comment:

Unhappily, little that the Commission undertakes in the antitrust area can be defended in terms of the objective of maintaining and strengthening a competitive economy. Consider price discrimination. There is now an impressive body of literature arguing the improbability that a profit maximizing seller, even one with monopoly power, would or could use below cost selling to monopolize additional markets. Yet, not only has the Commission continued to bring predatory price discrimination cases, but the alleged danger of predatory pricing remains a principal prop of its vertical and conglomerate antimerger cases . . .

Well, these attacks on that law, in that respect, led me in response to the ABA's Commission for the study of the Federal Trade Commission last summer, to comment on this, and I would like, Mr. Chairman, if I may, to offer for your record a copy of my responses to the questions that the ABA Commission submitted to each of the Federal Trade Commissioners.

I put mine in writing, I think I was the only member of the Commission that did so, and I offer this for the public record.

Mr. DINGELL. Without objection, the document referred to will appear at this point in the record.

(The information follows:)

FEDERAL TRADE COMMISSION,
Washington, D.C. July 1, 1969.

MILES W. KIRKPATRICK, Esq.,
Chairman, American Bar Association, Commission on the Federal Trade Commission, Washington, D.C.

DEAR MILES: In accordance with my commitment to your Panel when I met with you at the Madison Hotel yesterday, I am enclosing herewith the original record of the answers I presented yesterday to the questionnaire you transmitted to me under date of June 20, 1969. This is for the record of your Commission.

Simultaneously, I am arranging to have delivered to you under separate covers photo copies of this original (without appendices). Each of these copies is in an envelope addressed to each of the individual members of your Commission. They are, however, delivered to you for distribution to such members.

Allow me to use this opportunity to thank you for your courtesies extended by you and your Panel during the course of my meetings with you yesterday.

With best wishes, I am

Sincerely,

A. EVERETTE MACINTYRE.

EVERETTE MACINTYRE, FEDERAL TRADE COMMISSIONER—ANSWERS TO AMERICAN BAR ASSOCIATION QUESTIONNAIRE PRESENTED AT MEETING JUNE 30, 1969

INTRODUCTION

Ladies and Gentlemen: My appearance before you at this time is in response to the invitation and request made by your Chairman, Mr. Miles Kirkpatrick, by telephone June 20, 1969 and which was confirmed by him in a letter of that date to discuss with you matters under your consideration.

First, let me say that I do not think it would behoove any member of the Federal Trade Commission to undertake to suggest the composition of the membership of your Panel. It was for that reason that I opposed suggestions in the direction of who should or should not be selected to be members of your Panel. Also, I do not think it would be appropriate for a member of the Federal Trade Commission or anyone else connected with the Agency to attempt to tell you what to conclude or recommend in your report to the President.

In view of the thoughts I have expressed, I shall undertake to limit, for the most part, my remarks to the answers I make to the list of questions enclosed with the letter to me from Mr. Kirkpatrick under date of June 20, 1969. However, I realize that in those responses I may be providing statements of my views about matters relevant to the conclusions and recommendations you may make in your report.

By way of explanation, I should state that where my answers are made summarily and without reference to underlying evidentiary facts or supporting ultimate facts, that the judgment expressed is grounded upon my experience of almost four decades of work in the field of antitrust and trade regulation.

EVERETTE MACINTYRE, COMMISSIONER, RESPONSE TO AMERICAN BAR ASSOCIATION QUESTIONNAIRE TRANSMITTED BY LETTER OF JUNE 20, 1969

Question No. 1.—Selection of cases, enforcement procedures and policy planning

The Bureaus and Divisions have their own procedures for determining priorities and to select those cases which deserve Commission attention. The primary

problem seems to be that the Bureaus and Divisions are split along functional lines (for example, "Restraint of Trade" and "Deceptive Practices") and each Bureau, of necessity, makes its determinations within the area of its own responsibilities. Within those limitations this arrangement has worked reasonably well and I have no criticism of the manner in which the Bureaus have fulfilled these responsibilities.

The real problem seem to be that the Commission at this juncture does not have effective staff assistance standing outside the operating Bureaus and looking at the Commission's responsibilities as a whole. As a result, the Commission's review of its mission, goals, priorities, procedures and structure has generally been on an *ad hoc* basis as problems have become apparent.

Significant improvement could be effected in this area by making effective the Office of Program Review Director. This Office, when it was established, was expected to take active steps to facilitate policy planning at the Commission on an agency-wide level. The Program Review Officer, however, has not had the impact originally contemplated. The Office, consisting of the Program Review Director and one economist, simply did not have the resources to do the job expected. The Commission, in setting up the Office, recognized the necessity for continuous review of its policy, functions and organizational structure. This recognition is inherent in the task entrusted to the Program Review Officer. These may be summarized as follows: It is the mission of this Office to help the Commission weigh priorities and determine annual programs. The Program Review Officer, who reports directly to the Commission, is also charged with identifying, principally in cooperation with the Bureau of Economics, significant "trouble spots" in the economy in making recommendations for enforcement programs. He should be responsible for identifying and articulating appropriate criteria for initiating and evaluating the Commission's actions. Further, he should evaluate the utilization of the Commission's resources according to major programs and purposes.

The concept is sound. The principal problem is to make it work, namely, to make the Office of Program Review effective. A number of things should be done to achieve that objective. First, the position of Program Review Officer, which is now vacant, should be filled with an individual skilled both in management techniques and having an adequate legal and economic background to evaluate the Commission's objectives in the context of the resources available. In addition, the Office should be expanded by ensuring that the Program Review Officer will have an adequate staff. At present this Office has only one economist. If this Office is to work adequately it is prerequisite that the Program Review Officer have sufficient personnel to analyze the necessary data independent of the operating Bureaus, although he should, of course, work in cooperation with them. This is necessary to overcome the built-in resistance to change which may exist in any organization. Making the Office of the Program Review Officer effective so that it will actually fulfill the functions contemplated will stimulate the necessary review of the Commission's policy planning and structure. Improving the Commission's policy planning necessarily will lead to a more intelligent selection of cases and choice among possible enforcement measures.

Question No. 2.—Commingling

The flexibility inherent in the administrative process outweighs the possible disadvantages of commingling the prosecutorial, adjudicative and policy-making functions. The Administrative Procedure Act ensures that such commingling will not deprive those involved in Commission proceedings of due process.

The basic function of the Commission under Section 5 of the Federal Trade Commission Act is to define and remedy "unfair" trade practices if possible in their incipiency. To effectively fulfill these responsibilities under such a broad mandate the Commission must exercise the policy function. This in turn requires that the Commission effectively control the choice of remedy in the areas under consideration. Stripped of either the prosecutorial or adjudicative function the Commission's effective control over enforcement measures is of necessity diluted. Such discretion is vital if this agency is to deal effectively with unfair trade practices in their incipiency. The "conventional judicial processes [are] not well suited to such a task" and it is "better . . . performed within the framework of the administrative process."¹ Stripping the Commission of either the ad-

¹ Trade Reg. Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking and Accompanying Statement of Basis and Purpose 130 (1964).

judicative or prosecutorial functions would deprive this agency of its unique characteristics as an administrative agency, which, of course, is its reason for being.

For the same reason I would not favor delegating to the staff the function of filing complaints or the determination of whether to seek injunctions in the courts. Basically, these functions were entrusted to the Commission in order to pinpoint responsibility for public policy. Delegation of these activities would dilute agency control over policy and make it more difficult to evaluate the reasons for success or failure of the Commission's operations. Moreover, the delegation of such functions would present practical problems in view of current policy splits at the Commission level. Under these circumstances it would be difficult for the staff to pursue a coherent policy if it were charged with such duties.

Question No. 3.—Coordination with and allocation of responsibilities between the Federal Trade Commission and other agencies

In general, the existing arrangements for coordination and the allocation of responsibilities between this agency and the Department of Justice have worked satisfactorily. I feel, however, that in some instances there has been undue delay in processing the Commission's requests for civil penalty proceedings in cases where cease and desist orders have been violated. I am hopeful that recent discussions with responsible officials of the Department will iron out these difficulties. In the case of other governmental units, such as the FDA and the Department of Agriculture and other governmental agencies responsible for consumer protection, the liaison arrangements have, in the main, been satisfactory. The Commission should explore, however, the question of whether new arrangements need to be instituted or existing liaison arrangements strengthened with newly instituted governmental agencies with consumer responsibilities, such as the Department of Transportation and the Department of Housing and Urban Development.

Question No. 4.—Consumer fraud and deception

Within the limits of available resources I believe the FTC has devoted sufficient resources in recent years to consumer fraud and deception cases. In this connection there are obviously many areas which are essentially local problems and best left to the states or municipalities if they have the machinery available to deal with it.

However, it is difficult to generalize whether particular forms of deception are, as a general rule, local. For example, in the case of bait-and-switch advertising, when practiced by retail stores this is usually a local matter. On the other hand, in the case of many home improvement rackets bait-and-switch practices are an integral part of the operations of substantial interstate businesses which require federal intervention. Similarly, in the case of the holder-in-due-course defense, when the problem arises with respect to retail stores it is generally a matter of local concern. On the other hand, when the holder-in-due-course defense is used to defraud consumers in the case of deceptive sales schemes in commerce, involving, for example, aluminum siding, and where the business is, in effect, underwritten by a number of finance companies with knowledge of the fraudulent practices in question, then federal intervention on the part of the Federal Trade Commission is called for.

Question No. 5.—State and local enforcement agencies

The question of whether the resources of state and local enforcement agencies are adequate to cope with consumer fraud and deception is a difficult one to answer with precision. Undoubtedly, the quality of state and local enforcement agencies in the consumer area varies considerably. However, it is important to note that the Commission's staff responsible for liaison with state and local consumer units is convinced that local governments are constantly improving their capabilities. Undoubtedly, officials on the state and local level are faced with the same question as the Commission, namely, an almost unlimited demand for consumer protection opposed to limited resources for dealing with the problem. The real problem in this area is to convince the state and local legislative bodies of the necessity for providing adequate financing for consumer protection activities in the face of many other demands for funds.

The Federal Trade Commission has made considerable efforts to assist local units in the area of consumer protection. In this connection efforts have

been made to encourage the states to enact little FTC Acts and to assist local authorities in enforcing existing legislation. Further, the Commission's expertise, developed over the years in dealing with these problems, has been made available to local authorities, both in the area of drafting legislation and in advising as to the legal theories which might be helpful in attacking the problems within their jurisdiction. Apparently liaison between the Commission and local authorities is effective, for requests for advice and assistance from the states and referral of cases to them has markedly increased in recent years. I believe that at present the Commission's efforts in this area are well planned and thought out; the primary need is for the addition of more personnel to expand federal-state liaison activities already in effect. Here, the addition of only one or two lawyers may be expected to bring large returns.

Question No. 6.—Expansion of FTC efforts in protecting consumers against fraud and deception

If additional funds were provided for consumer protection, I would, in applying such resources, emphasize additional enforcement proceeding against national advertisers and emphasize consumer education, as well as cooperation with and training of local authorities. Particular stress should be laid on consumer education. In enacting laws such as the Fair Packaging and Labeling Act and the Truth-In-Lending Act, the Congress emphasized providing information to enable the consumer to make his purchases more intelligently. The fact remains that this legislation will not have the effect intended if the consumer does not actively take advantage of the information provided. In order to ensure that the Congressional intent in enacting this legislation is not frustrated, considerable effort will be required at the local level to ensure that consumers are aware of this legislation and the fact that it may help them to purchase more advantageously.

In general, consumer education may be one of the most efficient vehicles for alleviating the lot of the poor. It may be far less expensive to help a family save a given amount of money through intelligent purchasing than to achieve an equal increase in income. Many people not within the scope of current programs designed to increase incomes could be helped by consumer education programs. Moreover, even where higher income is achieved, such benefits may be dissipated by poor spending habits.

At this time, as far as the FTC is concerned, I do not believe that additional legislation is necessary to carry forward a satisfactory program. The chief problem is to marshal the resources necessary to adequately carry out existing laws. For example, in the case of the Fair Packaging and Labeling Act and the Truth-In-Lending Act, it may be difficult to finance aggressive and equitable enforcement in the light of budgetary limitations.

Question No. 7.—The D.C. consumer protection program

The primary goal of this program, in my view, was to gather information about the problems of the inner-city consumer in a typical metropolitan area. On the basis of information developed the Commission received invaluable insights into the problems of the economically handicapped. The pay-off will be in the Commission's efforts in the consumer education area as well as in liaison activities with local authorities concerned with consumer protection.

Question No. 8.—FTC difficulties re national media advertising and monitoring

The Federal Trade Commission's major problems in policing fraudulent and deceptive advertising in the national media lie in the area of evaluating product claims. The difficulty arises from the fact that the Commission does not have a staff which can conduct scientific and technical tests pre-requisite to Commission enforcement activity in many areas. On the other hand, advertisers in the national media as a general rule do have the funds to retain adequate scientific and technical staffs or consultants to work up data allegedly supporting the claims under study. To name only one example, this is clearly one of the principal problems facing the Commission in evaluating claims with respect to dentifrices represented as making teeth whiter and brighter but which may also be overly abrasive. Here the only solution is additional funds to employ the technical and scientific manpower necessary to analyze claims of this nature. Another solution might be to afford the Commission additional funds

whereunder it would secure technical help on a more consistent basis than in the past from agencies such as the Department of Health, Education and Welfare and the Bureau of Standards. The primary remedy here in my view is simply additional funds. However, additional legislation might be helpful if it were to authorize the Commission to utilize the scientific manpower available in other agencies.

The Commission's monitoring program at this time is not adequate. At present the only monitoring of national media done on a systematic basis is that of the national television networks' submissions to the Commission, which are reviewed by an attorney in the Food and Drug Advertising Division and by scientific personnel in the Division of Scientific Opinions. The monitoring of printed advertising, radio and local or regional television does not appear to be adequate at this time. By 1971, the Bureau of Deceptive Practices plans to put monitoring on a systematic basis with a staff of six. As I understand it, the plan is to utilize non-lawyers, by developing a non-professional staff to operate under the general supervision of a middle grade attorney. This projected program I believe will be a step in the direction of the in depth monitoring which is required to police unfair and deceptive advertising. Hopefully it can be brought into being before 1971, budget limitations permitting.

Again, in my view, the need here is not so much for additional legislation, but for the resources to adequately carry out the duties already entrusted to the Commission.

Question No. 9.—Motivational or subliminal advertising

It is my understanding that the question of motivational or subliminal advertising is now under staff study. My conclusions on whether expanded activities in this area by the Commission would be desirable will be based on information provided by the staff.

Question No. 10.—The Bureau of Textiles and Furs

In my view, the Federal Trade Commission's commitment of money and manpower to the Bureau of Textiles and Furs is worthwhile in terms of the results achieved. The Wool Products Labeling Act, the Fur Products Labeling Act, the Flammable Fabrics Act, and the Textile Fiber Products Identification Act are all "consumer" statutes. They provide the information facilitating value comparisons which consumers need to make informed and rational choices between competing products free of fraud and deception. Enforcement of these acts fosters the intelligent purchasing upon which a healthy competitive market economy necessarily depends. The Flammable Fabrics Act which of course is intended to protect the health and safety of the public is of necessity a statute which deserves aggressive enforcement. In my view, this Bureau consistently and efficiently has achieved the objectives set for it. Radical changes in the Bureau's organization and resultant disorientation of the staff would set back rather than further the cause of law enforcement.

Question No. 11.—Concurrent enforcement

I

The advantages of concurrent enforcement of antitrust outweighs the alleged disadvantages. The special contribution which both the Department of Justice and the Federal Trade Commission can bring to the antitrust area justifies continued antitrust enforcement activity by each. Effective antitrust enforcement rather than symmetry of organizational charts should be the goal.

The Commission as an administrative agency can bring a flexible approach to complex economic problems in this area which the Department whose enforcement is limited to the courts cannot match. Moreover, as the Supreme Court decision in *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316 (1966) illustrates, the Commission as an administrative agency with the power under Section 5 of the Federal Trade Commission Act to define "unfair" trade practices and to prohibit them in their incipiency has a unique function to fulfill. Were the Federal Trade Commission eliminated from the field, a vacuum in antitrust enforcement would become readily apparent. There would be no agency in existence with the tools to deal with unfair trade practices before they reached Sherman Act or monopoly proportions.

Further, it is valuable to have two agencies in this field, each with its point of

view of antitrust objectives. This ensures that the avenues to antitrust enforcement will be broadly explored. In short, a little competition in the field of antitrust enforcement is good for the public just as it is desirable in the market place. Consider for example the Commission's pioneering concern with conglomerate mergers—both the *Consolidated Foods* and *Poerter and Gamble* cases were initiated in the late fifties. Without the stimulus of two agencies in the field, it is obvious that many desirable approaches fostering a competitive economy might simply not be developed or not develop quickly enough at a time when a dynamically changing and complex economy requires quick reaction and flexibility by the governmental agencies responsible for antitrust enforcement.

II

I do not feel quite as strongly about the necessity for continuing concurrent regulation of drug advertising by the Federal Trade Commission while the Federal Drug Administration administers labeling requirements. Nevertheless, the unique experience of the Federal Trade Commission with respect to policing of advertising justifies its continued activity in this area. Certainly in the case of FTC regulation of drug advertising, FDA expertise is not lost because of the close liaison between the agencies.

The division of enforcement of the Fair Packaging and Labeling Act as to food, drugs and cosmetics by the FDA and as to other consumer commodities by the Federal Trade Commission is logical and should continue. Clearly, Congress was motivated by the desire to cause minimal disruption to the lines of authority developed by each agency in its area of responsibility and the desire to take advantage of the expertise each had developed in its own field.² These considerations are still valid today.

Question No. 12.—Voluntary compliance techniques and compliance with cease and desist orders

Initially I felt that the Commission's increased reliance on voluntary procedures was a success in that it enabled the Commission to dispose of a considerable volume of proceedings with respect to unfair or deceptive acts or practices cheaply and inexpensively. I feel, however, that the reliance on this procedure may have gone too far. At this point the Commission should increase the number of formal enforcement proceedings in order to preserve the credibility of the informal procedures. Moreover, it is my view that in many cases the Commission, in granting informal disposition, did not, as required by its own rules, take into consideration the gravity of the offense or the history of the offender. Too many assurances have been accepted in the case of respondents with long records of prior offenses, in many instances covered by cease and desist orders or prior assurances of discontinuances. Equally disturbing is the fact that in a number of instances assurances have been taken after the case has been fully litigated. In my view, once substantial government funds have been expended, the public is entitled to the maximum protection afforded—namely, an order to cease and desist rather than a promise which is patently unenforceable.

For your convenience I have attached a copy of the order of dismissal in *Marlo Furniture Company*, Docket No. 8745, issued January 16, 1969, and my accompanying dissent.³ That was a proceeding unjustifiably terminated after litigation on an informal basis. I incorporate the expression of views in that dissent by reference in this response.

In general, I'm satisfied that the staff is doing a thorough job in following up compliance with cease and desist orders. I have been disappointed, however, in a number of instances where the Department of Justice has either delayed on a Commission request for a civil penalty suit or disagreed with our position that a penalty proceeding should be brought.

Question No. 13.—Revision of the Robinson-Patman Act

I do not agree with the Neal Task Force Report, the Nixon Task Force Report or with the Johnson Council of Economic Advisory Report that it is time

² See generally "Truth-In-Packaging", Report of the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, Committee Print, 3, 88th Cong., 2d sess. (1964).

³ See Appendix.

for legislative changes in the Robinson-Patman Act. In my view, these criticisms of the Act and its enforcement gave little indication that the report writers in question brought their own experience or original research to bear on this issue. Rather, the impression is that primary reliance was given to secondary sources, which, in the main, were undisclosed. These criticisms of the Act constitute a classic example of the *dictum* that "[t]he antitrust field is, perhaps, of all areas of discourse the one in which practitioners live best by taking in each other's washing."⁴ On the other hand, the recent Seventh Circuit decision in *Federal Trade Commission v. National Dairies*,⁵ affirming the Commission's decision in that matter gives convincing and concrete support for the position that a competitive economy requires consistent and intelligent enforcement of the Act as it is now written.

Question No. 14.—Access to data underlying administrative actions by the Federal Trade Commission.

In my view, recent action by the Commission in relaxing the requirements which must be met before confidential data is made available went too far. I do not think they should be relaxed further. On this point I would like to make my position clear. The public is entitled to know what actions the Commission has taken, the position of the individual Commissioners voting on such actions and the rationale for their decision. However, the Commission's most recent policy which may be described as one of "maximum disclosure" glosses over the fact that the Commission, as an investigative agency, is the custodian of much confidential information from the business community and others. The investigative function is one of the most important duties lodged in the commission, and it is of considerable breadth. As the Supreme Court stated:

"[The Federal Trade Commission] has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. . . ."⁶

With so broad an investigative mandate the Commission obviously has a duty of keeping confidential the information received in the course of its investigations unless they are utilized in a public proceeding. This is required simply as a matter of equity since most informants giving information to the Commission do so on the understanding that this information is required for official government use by the Federal Trade Commission and that it will be held confidential. There are also practical reasons for respecting the confidence of those furnishing the Commission with information. If the Commission does not do so, inevitably sources of information will dry up and most, if not all, investigations will have to be conducted by way of litigation and compulsory process, with inevitable large-scale delay.

In this connection, it is interesting to note a recent example which I find disquieting, to say the least. In this connection, a respondent in the Midwest had been investigated by one of the Commission's field offices. Subsequently two reports from the Commission's investigative files were turned over to the Post Office. That respondent is involved in litigation with the Post Office in district court. The respondent demanded by way of discovery the complete files of the Commission, including all inter-office memoranda, interview reports with third parties and any other documents in the Commission's files relating to it. Such wholesale disclosure, now likely under the new procedures in effect, is likely to hamstring the Commission's investigations in the future as those approached in investigations lose confidence in the security of the Commission's files.

To recapitulate, I want to make it clear that I think there should be maximum disclosure about the Commission's administrative actions and the votes of the individual Commissioners and their positions. On the other hand, if the Commission is to continue the investigative function envisaged by Congress, a clear stand will have to be taken to protect the security of the Commission's investigational files.

Question No. 15.—FTC rules of procedure

I have no specific changes to recommend. I feel, however, it would be valuable if a general study of administrative procedure could be undertaken both

⁴ Mason, *Economic Concentration and Monopoly Problem*, 389 Atheneum (1964).

⁵ Attached hereto as an Appendix.

⁶ *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950).

by the private bar and concerned government attorneys and administrators with the object of simplifying administrative litigation which in my view over the years has become overly judicialized. I think we have lost sight of the fact that informality is the life blood of the administrative process. I would like to emphasize however that the study should be broadly based. Tinkering with the rules on an agency by agency basis is unlikely to have the far reaching results needed.

Question No. 16.—Personnel recruitment and policies

On the basis of my contacts with the younger professional staff, both lawyers and economists, I have in the main been impressed with their caliber. If the personnel procedures of the Federal Trade Commission are to be tested by the results achieved the Commission's recruiting policies have been reasonably satisfactory.

The Commission, for a number of years, has had a program of direct contact with some of the two hundred top law schools in the Country. I understand that changes were made to further improve recruitment of the younger members of the professional staff. In the scheduling of interviews the emphasis has been shifted from interviews conducted by the top officials of the Commission such as the Executive Director to having this function performed by younger attorneys of intermediate grade who would be better able to establish rapport with the applicants. In addition, the younger attorneys have also been given responsibility for taking part in the rating of applicants. Younger staff members have also been sent to interview prospective employees to discuss with them the problems and opportunities of employment at the Commission. Again, this is a function better performed by our newer employees who are able to understand the transitional problems of recent law school graduates. To my knowledge, such interviews have not concerned themselves with questions of race, religion, or politics, but solely with the applicants' ability to do the job.

I further understand that plans are now being implemented to cut down the turn over of the younger professional staff. In this connection, apparently a more thorough and intensive orientation program is now in effect and a real effort is being made to put new employees to work on substantive problems immediately. I understand that in the past the delay in putting new employees to work on questions of significance has been a real source of dissatisfaction. I trust that this deficiency is now being remedied.

In this connection, I might add a personal note. As a Commissioner who at one time was also a "young lawyer" at the Commission, I am convinced that one measure to increase enthusiasm and morale among younger lawyers would be to step up rate of litigation in significant areas of antitrust and consumer protection. This, I believe, would at one and the same time, raise employee morale and serve the public interest. It is my understanding in this connection that many of the younger professional staff have been disappointed by the fact that the opportunities for participation in litigation have been far less than they expected before coming to this agency.

Finally, I would like to note that while I am of course interested in the Commission's personnel practices and recruitment this is primarily a managerial matter within the jurisdiction of the Chairman. It is not an area where as a general rule other Commissioners should interfere. Should the other four Commissioners regard themselves as "Co-Chairmen" in this and other areas involving primarily managerial responsibilities, administrative chaos would be bound to ensue.

Question No. 17.—Organization of Commission staff and allocation of staff responsibilities

In my view, the present organization of the staff could be improved in the operating Bureaus by eliminating rigid functional lines. It is a mistake to freeze attorneys and particularly the younger attorneys into rigid categories such as "mergers", "price discrimination", or "general trade restraints". I believe that the operations of the trial bureaus could be made more efficient by eliminating such rigid stratifications and by assigning attorneys to cases on the basis of need. Furthermore, freezing an attorney's assignments merely to the area of one law is I believe stultifying. Giving attorneys a wider range of responsibilities would I believe be distinctly beneficial to their professional development. In addition, if such rigid categories were eliminated then the bureau

chiefs of either the Bureau of Deceptive Practices or the Bureau of Restraint of Trade would be far more flexible in transferring attorneys to those areas which have greater priority and where the greatest need for manpower exists.

Question No. 18.—The contribution of the hearing examiners

The primary function of the hearing examiners is to preside at adjudicative hearings. It may be that they are at this time under-employed because of a drop-off in the Commission's litigated cases. The temptation therefore might be to utilize them for purposes such as reviewing consent agreements prior to formal complaints if issued. While on its face the use of the hearing examiners for such additional duties might be helpful, I would be inclined to oppose use of the hearing examiners for purposes extraneous to their central function. In order to preserve their independence in my view the hearing examiners should confine their activities to adjudicative proceedings even though participation in other functions of the Commission might not violate the letter of the Administrative Procedure Act.

Question No. 19.—Industry-wide cooperation

The answer to this question is obvious. Certainly industry-wide cooperation can facilitate the Commission's work in proper cases. The real issue is what is the proper case for such proceedings. It is difficult to generalize on that question. Nevertheless, I can think of one example, namely, the Truth-In-Lending Act. Obviously here industry associations could do a great deal to implement practical compliance with the Act.

In other instances, industry-wide cooperation has to be approached cautiously both on the part of the industry and on the part of governmental enforcement agencies involved. For example, while industry self-policing to ensure ethical practices in an industry is a laudable objective it may conflict with antitrust objectives. Consider for example a concentrated market where industry leaders set up product standards with a tendency to raise new barriers to competition. In short, the desirability of such procedures is one which has to be determined on the facts of each case.

Mr. DINGELL. By the way, Commissioner, the Chair notes, it has been brought to my attention that you are a publisher of an article entitled "The Federal Trade Commission's Antitrust Functions, Practical Problems in Enforcement."

The Chair would like to request that you indicate at this time, or at any time you find it convenient, whether you wish to have the whole of that or portions of it inserted in the record, and if so, we will afford you leave to submit such portions as you wish to have inserted, at a time convenient to you.

Commissioner MACINTYRE. I think that since you brought that up, I will ask that that be done at this point in the record. I would like to suggest that you take it all because it does refer to a very important antitrust policy. This is whether to rely on structure or whether, in the enforcement of our antitrust public policy, to rely on those tools that would attack misbehavior as well as structural conditions. I think that the article in its entirety is necessary in order to understand what I have to say about the behavioral aspects.

Mr. DINGELL. Without objection, then, the document referred to will appear in the record at the appropriate place.

Commissioner MACINTYRE. In talking about some of the generalizations that are used in the challenge to the Robinson-Patman Act, I would like to refer to the generalizations which have come up with respect to the factual situation in the *National Dairy Products* case. That was decided in 1969 by the Seventh Circuit Court of Appeals.

Now, that was a Commission primary-line proceeding under section 2(a) of the Robinson-Patman Act. There the court found that the

respondent had engaged in a geographic price discrimination resulting in a loss of \$1,345,582 in its sales of jams and jellies. According to the court, this loss was, of necessity, subsidized from profits earned by National Dairy in other markets. Further, the court held that as a result there were great and damaging losses to the respondent's independent competitors, none of whom could meet or compete with such a selling program since the price was below the cost of materials alone. As the court noted, the independent competitors injured "are financially unable to compete with such a massive below cost sale."

Mr. DINGELL. You are referring to this, Commissioner, then as a classical behavioral example as opposed to structural, in the antitrust field?

Commissioner MACINTYRE. Yes, sir, because the Commission, even before this case was brought, had outstanding an order to cease-and-desist under section 7 of the Clayton Act prohibiting National from buying other people to increase its market power, but that order did not operate to prohibit National from doing what it did in this instance, with respect to discrimination in price.

Mr. DINGELL. What you are saying, then, is that National couldn't buy them so it ran them out of business?

Commissioner MACINTYRE. Well, a lot of them went out of business as a result of this action, and the Commission so found.

Sometimes, Mr. Chairman, it is cheaper to run out than to buy out, and a lot of small businesses in this country today inform us of the fact that they would rather sell it than to be run out, so we have a two-edged problem here.

Now, again in that particular case the Federal Trade Commission was not solidly behind its own findings, and its decision in that case. The record will speak for itself. You may review all the papers there and you will find who was for what, but you do need, in my opinion, at the Federal Trade Commission solid support for the sort of enforcement policy as was involved in the *National Dairy Products* case.

Clearly, the empirical data refutes the contention that the profit maximizing seller is inherently unlikely to use below-cost sales to monopolize additional markets. Further, the *National Dairy* case documents, contrary to the ABA report's assertion, that predatory pricing is indeed a phenomenon worthy of antitrust consideration. The report fails to make clear why the act should be condemned on the basis of unsubstantiated generalizations in direct conflict with market facts evidenced in the Commission's records.

Mr. WERTHEIMER. You said at that point the ABA's report, weren't you in fact referring to the Stigler report? I just wanted to clarify that for the record, we have been talking about the Stigler report.

Commissioner MACINTYRE. That was the so-called Stigler report, and the Stigler report appears, of course, in the record of your current hearings here at page 282, so I stand corrected on that.

Now, this was a report prepared for the advice to the President of the United States.

Gentlemen, the President of the United States is entitled, in my opinion, to better advice. He is entitled to more objective advice.

I don't know why he didn't get it in this instance.

Criticism of this nature, which ignores the pertinent facts, whether by intent or inadvertence, cannot justify erosion of the price discrimination law by the failure to challenge law violations when they occur.

The most oft-stated criticism of the Robinson-Patman Act which should be laid to rest is that it leads to price rigidity and that it stifles competition in concentrated markets. Specifically, the argument is made, as in the Neal report, and that was another report to another President, where I think some very bad advice was given, and you will find that in your printed record at pages 304 and 317 of your current hearings here.

The Neal report made the argument that price discrimination stimulates competition in concentrated markets and facilitates entry into oligopolistic industries.

Mr. DINGELL. Commissioner, could I interrupt you at this point to make an observation?

Commissioner JONES, who just preceded you at the witness table, made a statement that I never quite heard made in the same fashion before. As a matter of fact, I had never heard it, and she indicated that, as a matter of fact, one of the great protections of the Robinson-Patman is that it eliminates forces that would tend to impose a price rigidity through a sort of terrorizing of the small businessman into a pattern of uniform prices.

Would you want to comment on that point?

Commissioner MACINTYRE. Well, I know of that argument having been made.

Mr. DINGELL. I had never heard it before, and it struck me as a very useful one for the consideration of this committee.

Commissioner MACINTYRE. Of course as I proceed with my statement, I cover the argument in very much the same way that Commissioner Jones did in her statement this morning, but while we are right at this point, let me say that I have heard this argument about price discrimination being competitive and laws against the price discrimination being anticompetitive for a great many years, but I agree, as Commissioner Jones has stated to you, that the people who make that argument just fail to bring up the facts to back them up.

I heard back 35 years ago or so when we were trying the *Cement* case—and that case involved charges of discrimination as well as charges of price fixing—that the matter of any prohibition against price discrimination that would prevent people from cross-shipping into each other's territory would promote monopoly, local monopoly.

Let me give you an example of what they wanted. I will give a very common example. Let us talk about sand, which is very plentiful, as you know, in a good many parts of the earth. Washed sand is used for building material.

Well, here in Washington it is selling for about \$3.50 or \$4 a ton. Up in Philadelphia it is selling at somewhere near the same. A very large firm up there serves most of the Philadelphia area. A very large firm serves most of the Washington area. They are unable to compete in each of these towns against each other. Now, they couldn't afford to do that without doing one other thing, and what is that other thing? It is to raise the level of their prices in both Washington and in Phila-

adelphia to probably about \$12 a ton. Then, they could easily compete with each other.

That is, in both markets.

MR. DINGELL. By subsidizing the attack in the one market from profits in the other?

Commissioner MACINTYRE. Yes, sir. And, I would just leave that to almost anybody to draw the conclusion as to whether that is in the interest of the consumer.

But, we can get rid of discrimination in the interest of the consumer. We can leave it sometimes to the detriment of the consumer.

Of course I couldn't agree more with what Commissioner Jones was telling you earlier about it being in the interest of the consumer to have a law such as the Robinson-Patman Act and the public policy that is embodied therein, and I cite you to your record, February 6, particularly at pages 737 through 739, where a representative of one of the largest consumer organizations in the United States appeared before you and testified, representing over 146 member consumer organizations, representing, in turn, several million individual consumers.

Now, what was said there, let me just read you a paragraph or two from that testimony.

It was said:

We are witnessing what we view to be the most disturbing trend, the gradual but nonetheless pronounced disappearance of the small businessman. As I will expand in a minute there is a grave concern to consumers about this growing loss of small businessmen. I do feel that I can speak from some experience as to the concern of consumers as they relate to the matters coming within the scope of these hearings, a scope I might add that I view as being considerably broader than whether the Robinson-Patman Act should be amended. As I indicated a moment ago, I view this as a particularly appropriate time for the Consumers Federation of America to appear before this committee. The Robinson-Patman Act, after all, is the consumer protection act for small business. I have sensed, much to my concern, that there is some belief that consumers and small business are antagonistic. No doubt this feeling stems from the fact that many consumer complaints are directed to shoddy trade practices perpetrated by disreputable merchants. Let me state this as categorically as I know how. The economic well-being of the American consumer is inextricably tied to the viability of the American small businessman. If I succeed in making no other point this morning, Mr. Chairman, hopefully I will succeed in making at least that much clear. The consumer needs a small business, indeed the well-being of consumers is dependent upon the well-being of small business. This is why we are so concerned about the systematic attack that is being waged against the Robinson-Patman Act.

So, Commissioner Jones and I do not stand alone in our views that this law which prohibits price discrimination is in the interest of consumers as well as in the interest of the public generally.

The weakness of the argument in the attack on this law is that there is no empirical data that has been cited, as I said, to support the argument. In fact, the available economic data indicates the contrary. There is evidence that in a number of concentrated industries it is the small independent and medium competitor who affords significant price competition. For example, in certain industries major companies are more inclined to compete on the basis of nonprice competition such as product changes and promotional campaigns rather than price reductions to increase sales. It is the smaller competitor in such indus-

tries who has neither the security nor the investment of his large rivals who will characteristically use price more willingly and flexibly to attract customers for his products when demand is slack and to increase prices when demand is strong. Such firms are evidently more responsive to the laws of supply and demand. According to one comment, these competitors play a role entirely disproportionate to their size in keeping the market flexible and dynamic.

The Commission's primary-line price discrimination case relating to the roofing industry, the *Lloyd A. Fry Roofing Co.* case, also demonstrated the importance of independents for maintaining price competition in a concentrated industry. In that proceeding, the Commission made a finding affirmed by the court, that the major competitors, including Fry, had followed a system of price leadership leading to price uniformity. The challenged price discriminations, according to the finding, were instituted for the express purpose of discouraging lower prices by respondent's smaller rivals. As a practical matter, the predatory discrimination in Fry may be viewed as a policing mechanism in a price-fixing arrangement.

And, gentlemen, this occurs more often than we would like to see it occur.

In the beer industry, the hearing examiner's initial decision in Anheuser-Busch indicates that the discriminatory price cuts were initiated by Anheuser for the purpose of disciplining smaller competitors when they failed to raise prices in response to increased costs due to a labor contract. He further found that the price discrimination in question ended because the regional competitors of the large national seller, who initiated the price discrimination, had learned their lesson. Thereafter, they promptly followed Anheuser's subsequent price increases, being careful to keep the price differences between them and the respondent at an amount which would not bring further retaliation. In short, the Commission's evidentiary records indicate that selected price cuts in concentrated markets by dominant sellers are more apt to be utilized for disciplining competition and to lead to price rigidity rather than flexible and dynamic pricing as critics such as the authors of the Neal report have contended. The Robinson-Patman Act has a vital role to play in preserving price competition in concentrated industries where otherwise disciplinary price cuts might lead to rigid pricing conformity by all participants in the market.

Enforcement of the Robinson-Patman Act has also become confused as a result of a dispute between proponents of an antitrust approach looking to market structure alone and those who would concentrate solely on anticompetitive conduct. The advocates of either extreme have missed the mark. Any antitrust assessment with pretensions to validity requires a determination of why this is so.

Mr. Chairman, I believe this a point where we should insert in your record my article, of which you have a copy, the UCLA Law Review article, at this point.

Mr. DINGELL. Without objection, the document referred to will appear in the record at this point.

(The document follows:)

[From the UCLA Law Review, May 1967]

THE FEDERAL TRADE COMMISSION'S ANTITRUST FUNCTIONS: SOME PRACTICAL PROBLEMS IN ENFORCEMENT

(By Everette MacIntyre)*

Monopoly besides, is a great enemy to good management, which can never be universally established but in consequence of that free and universal competition which forces everybody to have recourse to it for the sake of self defense.

1 SMITH, THE WEALTH OF NATIONS 124

I. INTRODUCTION

The aim of the antitrust laws is to prevent private monopoly and to assure free enterprise.¹ Underlying this objective is the assumption that enough enterprises have both the will and the means to enter into, and stay in, business to assure effective competition in the market-place,² for the public policy embodied in the antitrust laws is based on the concept that it is the impersonal forces of competition which most efficiently allocate the nation's resources to foster efficiency, stimulate innovation, and, in general, satisfy the needs of the consumer.³ Further, the basic antitrust statute—the Sherman Act—like the Constitution, "seek[s] a maximum dispersion of power consistent with the marshalling of our spiritual and material resources."⁴ Antitrust, therefore, by obviating the need for more pervasive governmental economic regulation, in a very practical sense serves to maintain the cause of political freedom.⁵

The Commission's contribution to, and enforcement of, antitrust doctrine should be examined in this framework, and it is in the light of these considerations that recommendations for the adaptation of current antitrust practices to a changing economy should be evaluated. Such an analysis will be further facilitated by focusing upon the Commission's activities in enforcing section 7 of the Clayton Act⁶ and section 2 of the Clayton Act, as amended by the Robinson-Patman Act.⁷ Enforcement of these particular statutes has not only required the Commission to re-examine old procedures and policies in the context of a rapidly changing economy, but also has forced it to face the difficult task of resolving the seeming paradox at the heart of antitrust—namely, how much government intervention is appropriate to insure the free interplay of competitive forces so as to make additional regulation unnecessary?

II. ECONOMIC REALITY AND THE PROBLEM OF AGGREGATE CONCENTRATION

The most perplexing problem facing antitrust enforcement agencies at this time concerns the question of whether current antitrust doctrine is consistent

*Commissioner, Federal Trade Commission. Member of the North Carolina, Virginia & District of Columbia Bars. That portion of this paper relating to aggregate concentration and the problem of conglomerate mergers is based on an address delivered by the author, "Conglomerate Mergers and Antitrust Laws," before the Practicing Law Institute, New York, N.Y., Dec. 2, 1966.

¹ See Stocking & Watkins, *Monopoly and Free Enterprise*, in THE TWENTIETH CENTURY FUND 5-6 (1951).

² Reliance on the benefits of free competition has long been "among the fundamental premises of the American system," THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS 113 (Jan. 1967).

³ H.R. REP. NO. 175, 89th Cong., 1st Sess. 19 (1965). THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISERS, *op. cit. supra* note 2, at 114. Finally, casting aside the purely economic objectives, antitrust also has been described as a bulwark against concentration of economic power which, in turn, might result in the concentration of political power. Orrick, *Antitrust in the Great Society*, 27 A.B.A. ANTITRUST SEC. 26 (1965).

⁴ Schwartz, *A Law Professor's View of the Sherman Act—Fluid Fronts in the War Against Excessive Concentration of Economic Power*, 27 A.B.A. ANTITRUST SEC. 87, 91 (1965).

⁵ Can anyone seriously doubt that if the antitrust laws become a dead letter, competition would quickly become a myth? I have never believed that this country would long tolerate a system of private socialism, in which the basic decisions on price, employment, quality, and quantity of goods produced are made by a commercial and industrial power elite. Pressures in Congress would inevitable build for stringent, direct governmental controls to protect the public's interest? Orrick, *supra* note 3, at 30.

⁶ 38 Stat. 731 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964).

⁷ 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1935), 15 U.S.C. § 13(a) (1964).

with underlying reality. The problem is conveniently framed by the phenomena of overall concentration in the context of the large diversified or conglomerate company. This development, which has only recently received the attention it deserves,⁸ creates a critical challenge to current antitrust theory based primarily on economic and legal theories presupposing industries neatly and definitively compartmentalized by product and/or geographic boundaries. The solution will not be derived from simple legal formulas; for the conglomerate firm—in the context of overall concentration—poses questions on the frontier of antitrust, "that no-man's land where economics, law, and political science converge."⁹

A. "Competitors" or "Completion"?—A Search for a Standard

Any approach to the issue concerning the scope of section 7 of the Clayton Act with respect to conglomerate mergers and joint ventures is necessarily conditioned by one's views as to whether aggregate or overall concentration, as opposed to concentration in particular markets, is properly an antitrust problem. There is no unanimity on this point and a consensus is difficult to find.

The statements of Senators Hart and Hruska, both active participants in the recent hearings on economic concentration conducted by the Senate Subcommittee on Antitrust and Monopoly, illustrate the varying points of view. Senator Hart has concluded that the present antitrust policy has not been effective and that "for too long we have kept our heads in the sand and assumed that concentration has not been rapidly increasing. Like all major problems, refusing to admit its existence does not solve it."¹⁰ In Senator Hart's view, the agencies in charge of antitrust enforcement simply have not come to grips with the problems stemming from concentration. He deplores the fact that "major mergers are consummated without apparent challenge; [that] predatory practices often receive little attention; [and that] identical pricing patterns in concentrated industries seems to be regarded with little concern."¹¹ Senator Hruska, on the other hand, is of the opinion that overall concentration is of no relevance to antitrust since it has nothing to do with competition within a particular industry or the market behavior of a particular product. Antitrust analysis, in his view, should be concerned with particular markets and particular products. As a result, he believes computations of overall concentration can only be misleading. He fears the mere holding of the hearings on this subject may lead to a greater degree of government control than now exists.¹²

Disagreement over the antitrust implications of overall concentration has not been restricted to legislative committees. There has been mounting criticism of government enforcement of the merger statute by business and certain segments of the antitrust bar for sometime. This furor obviously stems from significant Supreme Court decisions in the last four years upholding both the Department of Justice and the Federal Trade Commission in the prosecution of various mergers. As a result, calls have arisen for restraint on the part of the enforcement agencies in selecting merger cases for prosecution.¹³

Those disturbed by current developments under the merger law apparently fear that the merger policy, as it is developing, will freeze business into an obsolete pattern. The argument is made that the attempt to preserve a market structure consisting of many competitors for the purpose of maintaining competition is groundless. The main thrust of this argument is evidently that a permissive merger policy will foster the flexibility, and encourage the innovation, essential to a dynamic economy. As I understand the proposition, a more permissive merger policy, allowing firms to acquire, by way of merger, managerial skills or additional product lines for purposes of diversification would result in

⁸ See generally *Hearings on Economic Concentration Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess., pt. 1, at 1, "Overall and Conglomerate Aspects" (1964) [hereinafter cited as *Concentration Hearings*]; *Concentration Hearings*, 89th Cong., 1st Sess., pt. 2, at 499, "Mergers and Other Factors Affecting Industry Concentration" (1965); *id.* pt. 3, at 1073, "Concentration, Invention and Innovation"; *id.* pt. 4, at 1535, "Concentration and Efficiency."

⁹ Berle, *The Measurement of Industrial Concentration*, in **XXXIV THE REVIEW OF ECONOMICS AND STATISTICS** 172 (1952).

¹⁰ Hart, *A Forecast of Antitrust Policy Regarding Economic Concentration*, 10 **ANTITRUST BULL.** 51, 53 (1965).

¹¹ Hart, *Emerging Paradoxes in Antitrust*, 30 **A.B.A. ANTITRUST SEC.** 80 (1966).

¹² Hruska, *A Forecast on Antitrust Policy Regarding Economic Concentration*, 10 **ANTITRUST BULL.** 61, 66 (1965).

¹³ "In short, the broadly tolerant view which the Supreme Court is likely to take of agency decisions to prosecute acquisitions makes it imperative, in my view, that the agencies candidly and thoughtfully face the full implications of their roles—antitrust is not just law enforcement. It is not a branch of whodunit law enforcement. Antitrust is economic regulation cast in the form of individual adversary proceedings. Those in charge of it . . . must justify their actions and their policy not only in terms of whether they win the case in the court (they usually will), but in terms of economic effect." Fortas, *Portents for New Antitrust Policy*, 10 **ANTITRUST BULL.** 41, 47 (1965).

competitors better able to withstand the vicissitudes of competition under modern conditions.¹⁴

The problem then boils down to this: should the antitrust agencies concern themselves at all with the size and shape of economic markets? All indications are that they should. The Supreme Court has expressed its view, also held by most of those responsible for antitrust enforcement, "that 'competition is likely to be greatest when there are many sellers, none of which has any significant market share,' is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute."¹⁵ In short, workable competition requires many firms, none of which has sufficient control over a product to substantially affect the price or terms of exchange that result from the bargaining process in the market;¹⁶ and, concentration has been singled out as a probable indicator of significantly noncompetitive markets.¹⁷

B. The Need to Define New Standards in the Case of Conglomerate Acquisitions

The difficulty lies in applying this standard to conglomerate mergers and, for that matter, to joint ventures, because the true conglomerate merger or joint venture does not increase concentration within a specific market—at least not initially, although there may be a measurable effect stemming from conglomerate acquisitions and joint ventures on overall concentration in the economy. Further, since the phenomenon of conglomeration has no immediate effect on the centralization or dispersion of economic power within particular industries or markets calculable in terms of market shares, many antitrust administrators are not comfortable with either the concept of overall concentration or conglomerate power. It is difficult to weigh the competitive impact of these developments by traditional legal or economic standards. Although antitrust agencies have begun to concern themselves with these phenomena, they are still groping for solutions in this area.¹⁸

¹⁴ Ways, *Antitrust in an Era of Radical Change*, Fortune, March 1966, p. 128.

¹⁵ United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963).

¹⁶ Testimony of Dr. David D. Martin, Graduate School of Business, Indiana University, *Concentration Hearings*, pt. 2, 698.

¹⁷ Testimony of Dr. Carl Kaysen, Professor of Political Economy, Harvard University, *Concentration Hearings*, pt. 2, 544.

¹⁸ There is some debate as to whether the degree of overall concentration in the economy is accelerating. There is testimony by economists to support either view, although, in my opinion, the evidence that there has been such an increase is, on the whole, somewhat more convincing. For example, Dr. Gardiner C. Means stated that manufacturing concentration, whether measured by total assets or by net capital assets, has increased greatly since 1929. He stated that the percentage of total assets for all manufacturing corporations held by the 100 largest manufacturing corporations increased from 40 to 49 percent in the period 1929 to 1962, while with respect to net capital assets, the percentage of the 100 largest manufacturing corporations in the same period increased from 44 to 58 per cent. Testimony of Dr. Gardiner C. Means, *Concentration Hearings*, pt. 1, 18-19.

Dr. Willard Mueller, Chief Economist of the Federal Trade Commission, determined that concentration measured on the basis of total assets held has increased in the period 1947 to 1962. According to his figures, the percentage of total assets held by the 113 largest manufacturing corporations increased from 40.0 per cent in 1947 to 46.6 per cent in 1962. Testimony of Willard Mueller, *Concentration Hearings*, pt. 1, 120-22.

On the other hand, Dr. M. A. Adelman, who made a study for the period 1931 to 1960, found that overall concentration of the largest manufacturing firms had remained quite stable over a period of 30 years and, in fact, found a decline in the share of the 117 largest firms of total assets from 46.5 per cent in 1931 to 45.4 per cent in 1960. Testimony of Dr. Adelman, *Concentration Hearings*, pt. 1, 235, 339.

In any case, taking a number of yardsticks, the extent of concentration now at hand is impressive. For example, a computation of the 500 largest industrial corporations' percentage of the sales, assets, and net profits for all manufacturing corporations in 1965 discloses that the 200 largest firms account for 49 per cent of the sales, 57 per cent of the assets, and 61 per cent of the net profits of manufacturing corporations in that year. (See Table.)

TABLE

The 500 largest industrial corporations ranked by net sales	Percentage of all manufacturing corporations		
	Sales	Assets	Net profits
1 to 50.....	30.20	35.63	40.89
51 to 100.....	9.01	11.43	10.18
101 to 150.....	5.62	6.02	5.69
151 to 200.....	3.98	4.08	3.96
201 to 250.....	48.81	57.16	60.72
251 to 500.....	60.56	70.09	73.71

The significance to antitrust of increasing aggregate concentration resulting from the conglomerate merger movement is that, as a result of diversification, certain firms have become more significant than the industries in which they operate.¹⁹ The conglomerate merger movement, it has been noted, threatens to break down traditional industry boundaries.²⁰ Accordingly, conventional economic analysis focusing upon market power in a single market and assuming a single product may have little, if any, relevance to the behavior of the large, diversified firm.²¹

The competitive implications of the large conglomerate firm stem from the fact that such a firm, operating across many different product or geographic markets, may not be subject to the competitive discipline of any one market.²² The large, diversified company's ability to withstand the discipline of a particular market may derive simply from its financial resources and from the fact that two or more conglomerate enterprises meeting in many markets may tend to soften their competitive tactics with respect to each other. On the other hand, smaller enterprises, depending entirely on their success in a single market, may tend to compete less aggressively with a large, diversified, multimarket company.²³

C. Market Structure Variables—A Realistic Standard

If antitrust is to deal effectively with conglomerate mergers, realistic tests applicable to particular product or geographic markets which take into consideration whatever competitive advantages a large, diversified company derives outside the relevant market must be devised.²⁴ Preliminary steps in this direction have been taken—witness the Commission's merger cases dealing with market extensions in the milk and retail grocery industries,²⁵ its attack on an acquisition in the laundry products field in which the conglomerate merger had overtones

¹⁹ Overall concentration, to a large degree, it appears, has been a function of business' drive for diversification. Cf. the testimony of Dr. Joel Dirlam, *Concentration Hearings*, pt. 2, 748. Indeed some commentators directly ascribe the increase in aggregate concentration to the conglomerate merger. Senator Hart states: "[T]here is a substantial consensus that much of the increase in overall concentration which has already taken place—to say nothing of the further increases which may occur in the future—stem from the rapid growth of the large conglomerate corporations." Hart, *supra* note 10, at 55. See also Houghton, *Mergers, Superconcentration and the Public Interest*, in ADMINISTERED PRICES—A COMPENDIUM ON PUBLIC POLICY, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY OF THE SENATE COMMITTEE ON THE JUDICIARY, 88TH CONG., 1ST SESS. 152, 154 (Comm. Print 1963).

Joint ventures also evidently bear some responsibility for this phenomenon. According to Dr. Willard Mueller, an examination of the largest manufacturing corporations indicates that, at a minimum, fifteen joint ventures with combined assets of almost nine hundred million dollars were included among the 1000 largest corporations in 1962. Testimony of Dr. Willard Mueller, *Concentration Hearings*, pt. 1, 113. The implications of the conglomerate merger movement for antitrust policy is demonstrated by the increase in mergers of this category to 72 per cent in 1960–66 at a time when the percentage of horizontal mergers has declined to 13 per cent of the total. Statement of Dr. Willard F. Mueller, Director, Bureau of Economics, Federal Trade Commission, Before the Senate Select Committee on Small Business, 90th Cong., 1st Sess., March 15, 1967, p. 45 (mimeo).

²⁰ Houghton, *supra* note 19, at 165.

²¹ See testimony of Joel Dirlam, *Concentration Hearings*, pt. 2, 770.

²² Statement of Dr. Willard F. Mueller, *The Conglomerate Food Retailer*, Before the Subcommittee on Antitrust and Monopoly, of the Senate Committee on the Judiciary, Sept. 12, 1966, p. 1 (mimeo). Furthermore, it has been asserted that if a multimarket firm possesses market power in some markets, this power may become a vehicle for achievement of market power elsewhere. For example, the large, diversified firm may use its financial power derived from a number of product or geographic markets to subsidize its expansion in additional areas.

²³ *Id.* at 2, 3; testimony of Dr. Corwin D. Edwards, *Concentration Hearings*, pt. 1, 43. See also Edwards, *Conglomerate Bigness as a Source of Power*, in BUSINESS CONCENTRATION AND PRICE POLICY—A CONFERENCE 331, 334 (1955). Adelman, on the other hand, has expressed the view that "a truly conglomerate merger cannot be attacked in order to maintain competition because it has no effect on any market structure." Adelman, *The Antimerger Act, 1950–60*, 51 AM. ECON. REV. 236, 243 (1961).

²⁴ An early expression in a § 7 case recognizing the importance of conglomerate power on local or single-industry markets is contained in *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1059–60 (1962), where the Commission stated: "[T]he 'leverage' advantage possessed by large, diversified, and geographically dispersed firms such as respondent [should not be ignored]. A small dairy operating in a single local market has its competitive behavior constrained by conditions existing in this market; a large diversified firm does not operate under similar market constraints. It may, if it chooses, outcompete the little man by subsidizing its operations in one market out of its operations elsewhere. Of course, this temporarily may lower slightly the average profits on its overall operations. But for the little man, losses in one market mean no profits at all—no profits with which to expand, no profits with which to develop new production techniques, no profits with which to make product improvements; or, simply put, the little man is deprived of the profits which, in a free enterprise economy, makes it possible for him to survive in the long run."

²⁵ See, e.g., *ibid.*; National Tea Co., Dkt. No. 7453 (FTC 1966).

of product extension,²⁶ and its position in the *Consolidated Foods* case, the first significant conglomerate merger coming to the attention of the Supreme Court.²⁷ In these cases, the Commission evaluated the impact of the acquisition by applying broadly three possible standards: the elimination of a potential competitor; the existence of reciprocity; and the effectuation of entry barriers to new competition.

While the Commission has proceeded against those conglomerate mergers which—at least in the short run—are likely to result in additional aggregate concentration, its competitive analysis has nevertheless focused on a particular industry or market. This emphasis will continue in the foreseeable future so long as the attack is not on bigness as such. In short, conglomerate mergers require an analysis of market structure,²⁸ beyond the mere computation of market shares, entailing an examination of other variables which determine firm behavior in an industry, including product differentiation and barriers to entry.

1. Product Differentiation—The stress on product differentiation as a market structure variable of antitrust significance is likely to increase. The Assistant Attorney General in charge of the Antitrust Division apparently has suggested that where heavy advertising expenditures create durable consumer preferences going beyond the relative superiority of the product, thereby causing the formation of entry barriers,²⁹ some limitations on outlays of this nature may be called for.³⁰ A regulatory approach of this nature, however, requires cautious treatment and the utmost good judgment in the exercise of administrative action. Otherwise, it could result in a situation which is the very antithesis of anti-

²⁶ FTC v. The Procter & Gamble Co., 87 Sup. Ct. 1224 (1967).

²⁷ Dkt. No. 7000 (1963), *rev'd*, 329 F.2d 623 (7th Cir. 1964), *rev'd*, 380 U.S. 592 (1965).

²⁸ "The term market structure refers to those 'characteristics of the organization of a market which seem to influence strategically the nature of competition and pricing within the market.'" Address by Willard Mueller, Director, Bureau of Economics, Federal Trade Commission, "Public Policy Towards Mergers in Food Retailing," Conference on Competition in Food Marketing, Agricultural Policy Institute, North Carolina State University, Raleigh, N.C., Jan. 24, 1967, p. 3 (mimeo).

²⁹ Product differentiation is a source of barriers to entry. When this condition occurs, the established firm has a reservoir of customer goodwill which its advertising and sales promotion need only to maintain. A new firm in the industry, however, "must sell at prices below those of the more preferred brands of established sellers or invest heavily in advertising and other types of promotional activity in order to achieve a preferred status for their own brands and a sales volume capable of generating low unit processing and distributing costs." FTC, THE STRUCTURE OF FOOD MANUFACTURING, 62 (1966) (Technical Study No. 8). This may well be a decisive factor for the potential entrant. See CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT, PERFORMANCE 27 (1964). See also the concurring opinion of Mr. Justice Harlan, joined by Mr. Justice Stewart, in United States v. Pabst Brewing Co., 384 U.S. 546, 555 (1966), which states: "This heavy emphasis on consumer recognition and promotional techniques in the marketing of beer, supports the conclusion that there does exist a substantial barrier to a new competitor in a regional market such as Wisconsin. To enter this market the new entrant must be prepared to incur considerable expense over a substantial period of time creating a distribution network and advertising his brand in order to compete more or less on a parity with an established seller in the Wisconsin Market." *Id.* at 560.

³⁰ "To an extent, the increased barrier to entry created by advertising is a price we have to pay for providing consumers with information. But when heavy advertising and other promotional expenditures create durable preferences going beyond the relative superiority of the product, resistant to anything but major countervailing promotional campaigns, we may well question whether the price has not become too high. If heavy advertising expenditures thus serve to raise the barriers to entry, the adverse competitive consequences are important not only because new firms are kept out, but also because frequently it is the prospect of new entry which serves as a major competitive restraint upon the actions of existing firms."

"[I]t would be quite appropriate to impose, for a period of time, an absolute or percentage limitation on promotional expenditures by a firm or firms that have obtained undue market power through violations of the Sherman Act. . . ."

"Advertising often plays a role analogous to that played by market concentration. We have taken a dim view of excessive concentration precisely because it leads to monopoly results, and this is a major element of the rationale which underlies the laws prohibiting anticompetitive mergers. Current policies which tend to emphasize the role played by concentration may well need to be supplemented by those concerned directly with the adverse influences of advertising and other promotional efforts on competition. We should begin to consider seriously how best we might promote and develop other methods of supplying information to consumers—methods which would give the consumer much better and more useful information than he now gets and at lower social cost; which would thus decrease the impact, profitability, and amount of private advertising expenditures; and which would consequently improve competition in many industries by lowering barriers to entry." Address by Donald F. Turner, Assistant Attorney General in Charge of the Antitrust Division, U.S. Dept. of Justice, "Advertising and Competition," Briefing Conference on Federal Controls of Advertising and Promotion, Federal Bar Ass'n, Washington, D.C., June 2, 1966, pp. 4, 5, 10, 11, 13, 14.

trust. At any rate, the mere suggestion of such a policy—apparently striking a sensitive nerve—has already created some controversy.²¹

2. Barriers to Entry—The virtue of analyzing the impact of conglomerate mergers in terms of barriers to entry of new competition is that such analysis facilitates the evaluation of the competitive impact of conglomerate mergers on a single, well-defined industry.²² Considerable empirical research, however, seems desirable so that general application of this theory will, in fact, result in an economic analysis of the competitive impact of a diversification merger on a specific industry or market rather than in merely an attack on bigness as such.²³ In time, it is even conceivable that, in the proper case, the application of this

²¹ See, e.g., Lawrence, *Must Competitors Be Equalized in Money and Skills*, U.S. News & World Report, Nov. 28, 1966, p. 112; *Justice in a Lather Over Soap Ad Outlays*, Business Week, Nov. 5, 1966, p. 44; *Advertising: On Government Restrictions*, N.Y. Times, Feb. 12, 1967, § 3 p. 14F. Subsequently, "distressed by 'misapprehension' of [these remarks] . . . Assistant Attorney General Donald F. Turner used last week's annual government-relations conference of the American Advertising Federation as an occasion to explain 'what I did not say. I did not say that a general antitrust onslaught against heavy advertising was either possible or appropriate.'" Antitrust & Trade Regulation Report No. 292, A-8, Feb. 14, 1967 (BNA).

²² The concept of barriers to the entry of new competition measures the obstacles to entry of potential competitors into particular industries or markets. Taking into consideration the barriers to entry, it should be possible to determine the cost or selling price advantages held by established firms in an industry relative to new or potential competition. This may be described as the condition of entry. The importance of this concept is clear, for: "If the advantage of established firms is great, then the constraining influence on pricing provided by the threat of additional competitors entering the industry is weak. On the other hand, if established firms hold only a slight advantage, the conditioning influence of the threat of new competition is great. If entry conditions favor easy entrance, established firms would be under pressure to keep prices near competitive norms, much the same as if the market of established firms were atomistically structured." THE STRUCTURE OF FOOD MANUFACTURING, *op. cit. supra* note 29, at 61-62.

Barriers to entry can be categorized roughly under three headings: economies of scale, absolute costs, and product differentiation. Reciprocity, or at least the market power permitting its exercise, also logically comes under this heading. In this connection, see Dixon, *Merger Policy and the Preservation of the Competitive System*, 30 A.B.A. ANTI-TRUST SEC. 86, 90 (1966): "[R]eciprocity may become an extremely significant market strategy to the conglomerate enterprise which buys and sells a large number and volume of industrial goods and services in oligopolistic markets. . . . If carried to its ultimate, the practice could result in closed-circuit markets from which medium or small factors are excluded. . . ."

Barriers in the form of economies of scale arise from the fact that a firm may not secure the lowest possible production costs until it has achieved a certain share of the market which it is about to enter. Since in many instances a firm entering a new market may well have to start with a less-than-optimum market share, this factor will obviously impede entry. On the other hand, the presence of absolute cost barriers indicates that the potential entrant will not be able to overcome the cost advantage of the established firm at any rate of output—for example, the established firm may have patents which prospective entrants can secure only by paying a royalty or spending funds necessary to invent substitutes for them. CAVES, *op. cit. supra* note 29, at 24-26. Significantly, the various entry-retarding factors may interact, thus giving particular entry barriers a greater competitive impact than if they were acting alone: "The significance of product differentiation as a barrier is greatly increased if accompanied by important scale advantages in either production or distribution. Faced with both a heavy product differentiation disadvantage and the necessity for having to operate at a relatively large scale, the new entrant would find it particularly difficult to achieve an initial share of the market commensurate to profitable operations." THE STRUCTURE OF FOOD MANUFACTURING, *op. cit. supra* note 29, at 62.

²³ The data necessary to probe effectively the question of whether profits in one market have been, or are likely to be, used to subsidize entry to, or expansion in, another market in many instances simply has not been presented. Requiring conglomerate concerns to report their earnings by divisions should facilitate the analysis of the practical consequences of the conglomerate aspect of a large, diversified company to competition in specific markets. See testimony of Yura Arkus-Duntov, Investment Officer, Dreyfus Fund, New York City, *Concentration Hearings*, pt. 4, 1705, who stated that more and more companies are becoming conglomerate through acquisition, thus steadily narrowing the field of investment in single product industries and therefore posing problems for the investor in evaluating their efficiency. The antitrust enforcement agencies, of course, are also faced with similar problems of evaluation. See Mueller, *supra* note 22, at 32: "One of the basic problems in identifying and measuring the significance of a particular conglomerate firm's conduct is that we generally know so little about the financial characteristics of its constituent parts. The public financial statements of conglomerate enterprises are almost universally presented on a consolidated basis. This makes it virtually impossible to translate the impact on profits of particular business practices."

Similarly, there should be more studies to determine the relationship between price-cost margins in an industry and the degrees of concentration in that industry. Data of this nature is extremely useful and some interesting and significant studies on this subject have already been made in the food industry which may lay the groundwork for further research along these lines. See testimony of Dr. Norman R. Collins, Department of Agricultural Economics and School of Business Administration, University of California, *Concentration Hearings*, pt. 2, 719. The Economic Staff of the Federal Trade Commission has also made some studies along the same lines as Dr. Collins on the relationship between profits and concentration in food manufacturing: "Analysis of the market structure of markets occupied by large food manufacturers showed a close positive statistical associa-

theory to conglomerate acquisitions will afford the responsible administrative agencies and courts with a sense of assurance approaching the comforting certitude derived from market share computation in the case of horizontal mergers.³⁴

Whether the concept of barriers to new competition will be translated into legal axioms as the courts consider merger cases brought by the enforcement agencies is currently one of the most significant antitrust issues. This, in essence, is the question before the Supreme Court in the Federal Trade Commission's appeal from the Sixth Circuit's decision vacating its order requiring divestiture in the *Procter & Gamble* case.³⁵ Significantly, with the holding that "potential competition . . . may compensate in part for the imperfection characteristic of actual competition in the great majority of competitive markets," the Supreme Court has apparently accepted the premise basic to this theory.³⁶

D. Aggregate Concentration—A Question for the Legislature

Although conglomerate acquisitions should be dealt with where the probability of anticompetitive effect can be demonstrated in specific markets and industries, it is my view that the Sherman and Clayton Acts were not designed to cope with the problem of overall concentration as such.³⁷ There is merit to the suggestion that if the government is to concern itself with the problem of superconcentration, then such action should be undertaken pursuant to a statute designed expressly to cope with that problem.³⁸ To tackle the problem of overall concen-

tion between the level of market concentration and profit rates. That is to say, firms selling in highly concentrated markets earn substantially higher profit rates than those selling in less concentrated markets." THE STRUCTURE OF FOOD MANUFACTURING, *supra* note 29, at 212.

For a business view challenging the theory on empirical grounds, see Address by Glen McDaniel, Chairman of the Executive Committee, Litton Industries, Inc., "Antitrust and the Status Quo in a Changing Society," Antitrust Law Section, New York State Bar Ass'n, New York, N.Y., Jan. 25, 1967, pp. 6-7: "Reliance on structure and theory alone is too far out of touch with competitive and business reality to produce dependable results. As our technology expands, you will not be able to protect competition by merely protecting structure. Theory which ignores the facts will become increasingly undependable. Take the theory that a conglomerate merger should be condemned because a multi-industry company can use profitable products to subsidize unprofitable products. Certainly in our company, and in others with which I have had contact, each product must stand on its own feet as a profitable endeavor. The aim is to make unprofitable products profitable or to eliminate them—not subsidize them."

"The barriers to entry and multiplicity of contacts theories are equally illusory. I do not know of a single large company which we meet competitively in more than one market that is a patsy as a competitor, nor am I aware of any smaller competitor that is afraid to tackle us head-on in the market place. My experience has been to hear small companies boast about how they are able to beat big companies because they are more flexible and can act faster. Litton was a small company that did just that to its big competitors. Thousands of little companies are doing it every day."

³⁴ According to Bain, the condition of entry may be evaluated by the degree to which established firms can raise their prices above a competitive level without inducing new firms to bring added capacity into use in the industry. BAIN, BARRIERS TO NEW COMPETITION 6 (1965 ed.). Assuming that the competitive price and the entry-forestalling price for particular industries can be established, this suggests that some sort of a mathematical value might be set on the magnitude of the barriers to entry facing potential competitors. Keeping in mind the dictum found in the *Procter & Gamble* case that the condition of entry is not translatable into "the ready crutch of percentages" it is nevertheless an interesting question whether such a quantitative measure is possible in the first place and, secondly, whether it might not be at least a relevant consideration in the case of the diversification merger.

³⁵ Since this article was written, the Supreme Court decided *Procter & Gamble*, upholding the Federal Trade Commission. 87 Sup. Ct. 1224 (1967). The decision, turning on the Court's holding that the merger "may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing" and the elimination of the potential competition of *Procter & Gamble* clearly places judicial approval on a structural analysis of the effects of conglomerate mergers in the framework of barriers to entry. The Court's holding, focusing on the competitive implication of this merger in the well defined bleach market, does not, on its face, justify an attack on aggregate concentration as such in the case of the diversification merger.

³⁶ See *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964).

³⁷ Professor Corwin Edwards, despite his suggestion that § 7 should be applied in the case of conglomerate mergers wherever possible, concedes that it is difficult to bring the antitrust laws to bear on these amalgamations. *Concentration Hearings*, pt. 1, 45-46.

³⁸ It is interesting to note that Donald Turner, Assistant Attorney General in Charge of the Antitrust Division, has suggested the possibility of dealing with overall concentration by legislation specifically designed to curb growth by way of acquisitions in the case of certain of the largest corporations. Mr. Turner, on this occasion, specifically disclaimed having reached the conviction that there is a trend toward super-concentration, and stated that he did not want to be understood as proposing a law against this phenomenon but merely suggesting it "as a separate avenue of action is appropriate." "U.S. Aide Hints at Trust Law To Bar 'Super-Concentration.'" The Evening Star, Washington, D.C., April 15, 1966, p. C-1, col. 1, 2. See also report of Mr. Turner's testimony before the Senate Small Business Committee on April 6, 1967, reported in Antitrust Trade Regulation Report No. 300, A-11, April 11, 1967 (BNA).

tration head-on would constitute an attack on mere bigness, for which there is no warrant in present legislation. The antitrust laws simply do not give the Federal Trade Commission or the Department of Justice a mandate for planning the structure of the economy as a whole by way of a challenge to aggregate concentration. Such an approach, spurred by militant ideology and the exercise of discretionary power, could only "culminate in a major confrontation with the whole American industrial structure." It would almost inevitably be restrained by political action.³⁹ Moreover, the economic disadvantages of an attempt to utilize the antitrust laws as a vehicle for a wholesale restructuring of all markets in the direction of purer competition are equally obvious:

"Wholesale dissolution of our large corporations or forced divestiture of many of their expanded or branching parts is a program espoused by only a small minority of doctrinaires. Gains that might be accomplished at certain points would be far overbalanced by general disruption of the intermeshed fabric of our dynamic business life. The administrative burden of such a campaign and the subsequent policing of its decrees would be crushing. Moreover it would so far out-run proven knowledge of the real nature of the problem and exceed the availability of competent regulatory personnel that numerous and costly blunders would be inevitable—many of them irreversible. . . ."⁴⁰

The fact is that the past three years' hearings on various aspects of economic concentration, held by the Senate Subcommittee on Antitrust and Monopoly, are furnishing the Congress with a wealth of information on the subject of the competitive, political, and social implications of economic concentration; and a number of bills were introduced in the Congress in 1962 to deal specifically with this problem.⁴¹

Accordingly, a radical break from past antitrust policy is not warranted where Congress is obviously cognizant of the problem and to date has failed to act. On the other hand, the antitrust enforcement agencies should evidence a commitment, in the light of Supreme Court decisions on the subject, to enforce the merger statute where the probability of anticompetitive effect can be demonstrated in specific industries or markets—be the acquisition horizontal, vertical, or conglomerate.

III. HORIZONTAL AND VERTICAL ACQUISITIONS

The antitrust issues presented by horizontal and vertical acquisitions under section 7 are better defined than the frequently nebulous questions raised by the diversification merger or the debate on the antitrust consequences of aggregate concentration. In these cases, therefore, the Commission is in a better position to fulfill the function of "[substituting] counsel and accommodation for the harsher processes of legal restraint. . . ."⁴² In contrast to conglomerate mergers where antitrust policy is still necessarily in the process of formulation on a case-by-case basis, the enforcement of the law with respect to horizontal and vertical mergers lends itself more readily to expressions of policy designed to dispel business uncertainty.⁴³

A. Enforcement of Section 7 on an Industrywide Basis

The action of the Commission in formulating guidelines which spell out its enforcement policies for mergers in the food distribution industries⁴⁴ and for vertical mergers in the cement industry⁴⁵ is of particular significance; it is in these areas that the Commission is making a pioneering attempt to lay the groundwork for enforcing section 7 on an industrywide rather than on an *a*l*hoc*** basis. The crystallization of enforcement policies for these industries should not

³⁹ Cook, *Merger Law and Big Business: A Look Ahead*, 40 N.Y.U.L. REV. 710, 722 (1965).

⁴⁰ Nourse, *Government Discipline of Private Economic Power, Administered Prices—A Compendium on Public Policy*, Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess. 245, 247 (1963). See also DIRLAN & KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 284 (1954).

⁴¹ S. 3167, H.R. 11870, H.R. 11871, H.R. 11872, 87th Cong., 2d Sess. (1962).

⁴² XVI MESSAGES AND PAPERS OF THE PRESIDENTS 8158 (Bureau of Nat'l Literature, Inc. Press).

⁴³ In the merger area, certainly, President Wilson's dictum is particularly apt: "Nothing hampers business like uncertainty. Nothing daunts or discourages it like the necessity to take chances, to run the risk of falling under condemnation of law before it can make sure just what the law is." 1 WILSON, *THE NEW DEMOCRACY* 55 (Baker & Dodd ed. 1926).

⁴⁴ *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, Jan. 3, 1967 (FTC News Release).

⁴⁵ *Enforcement Policy with Respect to Vertical Mergers in the Cement Industry*, Jan. 3, 1967 (FTC News Release).

only facilitate more informed decisions on the part of business but also expedite proceedings to enforce section 7 of the Clayton Act.⁴⁶

1. The Cement Industry.—With regard to the cement industry, the Commission, both in the litigated cases and in the industry hearings, has demonstrated concern for the competitive impact of the acquisition of ready-mixed concrete firms by cement producers.⁴⁷ The economic significance of such integration becomes readily apparent when it is realized that the ready-mixed concrete industry consumes approximately sixty per cent of the output of the cement industry.⁴⁸ In the light of this and other crucial market characteristics, and in the face of an increasing trend toward such mergers, the Commission has formulated the following criteria governing its enforcement of the law in this area:⁴⁹ the Commission will issue a complaint challenging the acquisition, unless unusual circumstances dictate to the contrary, when the acquisition involves one of the four leading nonintegrated ready-mix producers in any metropolitan market or when the acquisition involves a ready-mixed concrete company or other consumer of cement regularly purchasing 50,000 barrels annually. Mergers in these categories will be considered as substantial.

This does not mean, however, that the acquisition of small firms will necessarily go unchallenged. The cumulative effect of the acquisition of several smaller concerns may be as severe and anticompetitive as the acquisition of a single larger firm. Finally, the intention to challenge all substantial vertical acquisitions does not exempt markets where integration has already occurred, since it is the Commission's policy to preserve the open segments of such markets to the greatest extent possible.

These enforcement standards are justified in light of the economic data gathered by the Commission. As a general rule, the primary purpose of forward vertical acquisitions by cement manufacturers into ready-mixed concrete has been to secure captive customers and protect market outlets from competitive inroads.⁵⁰ With few exceptions, vertically integrated concrete firms have secured the major output of their cement requirements from the manufacturing facilities to which they were tied by ownership, thus resulting in actual, as well as potential, foreclosure of nonintegrated cement manufacturers.⁵¹ Virtually all of these acquisitions have occurred since 1960, a period of low-capacity utilization, falling profits, and increasing manifestations of competitive rivalry; and, most of the recent acquisitions have taken place in areas where new competitors have entered the market. Under these circumstances, it is reasonable to conclude that the pressure to protect customer outlets from competition has been a significant consideration in these transactions.⁵²

Further, it is unlikely that significant cost savings would be realized by the integration of cement suppliers with cement customers. Ready-mixed facilities must be located near ultimate consumers and their operations must be adapted to the on-the-spot requirements of the customer. These factors reduce the opportunities for production and management economies through integration.⁵³

Thus, the available economic evidence indicates that, as a general rule, the fairly rigorous stand taken in the policy statement against vertical mergers is warranted. By resorting to an industry-wide expression of policy, instead of relying on a case-by-case approach, the Commission may have nipped a "catching fever" of acquisitions in the bud.⁵⁴

2. The Food Distribution Industry.—Similarly, the Commission's articulated policy concerning mergers in the food distribution industries should inject greater

⁴⁶ The statements of enforcement policy, however, do not preclude individual cases. In each proceeding, Commission counsel will have the burden of proving the allegations of the complaint and the hearing examiner as well as the Commission will be required to render the adjudication on the basis of the record in accordance with the requirements of the Administrative Procedure Act. Lehigh Portland Cement Co., Dkt. No. 8680 (FTC Feb. 6, 1967) (order denying motion to vacate complaint).

⁴⁷ Ready-mixed concrete firms mix cement and various aggregates for use as concrete and deliver this product to construction sites.

⁴⁸ STAFF REPORT TO THE FTC, ECONOMIC REPORT ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY 1 (April 1966).

⁴⁹ Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, *supra* note 45, at 8-12.

⁵⁰ ECONOMIC REPORT ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY, *op. cit. supra* note 48, at 98.

⁵¹ "Currently, concrete operations which had been integrated through merger receive about two-thirds of their cement requirements from internal sources." *Id.* at 100.

⁵² *Ibid.*

⁵³ *Id.* at 101.

⁵⁴ *Id.* at 107.

predictability into enforcement of the merger statute in this area,⁵⁵ since it, too, sets forth with considerable precision the kinds of acquisitions which warrant the Commission's attention in possible enforcement proceedings. Essentially, mergers and acquisitions by retail food chains which result in combined annual food store sales in excess of \$500 million annually and mergers and acquisitions by voluntary and cooperative groups creating a comparable volume of wholesale sales have been singled out by the Commission as sufficiently dangerous to competition to warrant investigation.⁵⁶

Although concentration in much of the food industry may not yet be high enough to impair seriously the effectiveness of competition, concentration in retail selling seems destined to increase; and the continuing growth of wholesalers and buying organizations, when considered in conjunction with the growth of retailers, can only result in increased concentration of purchases.⁵⁷ Therefore, the principal danger to continued competition is posed by additional dominant firm mergers.⁵⁸ In short, the economic data demonstrates a clear public interest in stemming further increases of concentration in food distribution provided the policy does not preclude efficiencies arising from economies of scale.⁵⁹ This policy statement should contribute to the maintenance of competition in the food retailing industry, particularly in the purchase of grocery products sold in national markets, and should encourage economic efficiency by channeling mergers toward those companies not yet enjoying all the economies of large-scale procurement and distribution.⁶⁰

IV. PRICE DISCRIMINATION—A NEED FOR RE-EVALUATION OF THE COMMISSION'S ROLE

While the Commission has been relatively successful in utilizing the tools of economic analysis to keep antitrust policy abreast of the changing economy in the context of mergers and acquisitions, the development of policy by the Commission in the field of price discrimination, as it pertains to primary line discrimination, affords an interesting contrast. I am persuaded that, judged either by a qualitative or a quantitative standard, the Commission's activity in this area has been unimpressive.

Turning first to the quantitative measure, it is obvious that the Commission's enforcement of the Act by any objective measure has noticeably slackened. As a leading commentator on the Robinson-Patman Act has noted:

By comparison with 48 price discrimination complaints in fiscal year 1960, the Commission issued just 3 Section 2(a) complaints in fiscal 1965. Compared with 97 orders and 3 dismissals in fiscal 1961, there were 21 orders and 19 dismissals in fiscal 1965. The Brokerage Clause has simply vanished; the Commission's last 2(c) complaint came out over three years ago.⁶¹

⁵⁵ For a discussion of the Commission's potential for clarifying the merger law through rule-making see Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. REV. 613 (1965).

⁵⁶ The Commission noted further that market extension mergers involving companies with combined annual sales of less than \$500 million, generally would not pose a serious threat to competition except when they involved some competitive overlap. The Commission also indicated that acquisitions by food chains or wholesalers which resulted in combined annual food store sales of between \$100 million and \$500 million warrant investigation. *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, *supra* note 44, at 8, 9.

⁵⁷ NATIONAL COMM'N OF FOOD MARKETING, FOOD FROM FARMER TO CONSUMER 73 (June 1966).

⁵⁸ *Id.* at 106. Concentration in food retailing has reached record levels in many metropolitan areas. By 1963, the four largest retailers typically accounted for 45% of grocery store sales in local metropolitan areas and 54% in smaller ones. Further, in the period 1954 to 1963 there was a steady increase in local market concentration. Mueller, *supra* note 27, at 8.

⁵⁹ In this connection, it is significant that the Commission found that economies of retail selling are achieved by units with annual sales of between \$1 million and \$2 million; and that economies of scale in performing the warehousing function most probably do not extend beyond the \$75 million to \$100 million range. *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, *supra* note 44, at 7. See also FOOD FROM FARMER TO CONSUMER, *op. cit. supra* note 57, at 71, 72. Advantages associated with size beyond this scale relate primarily to manufacturing operations, private label programs, and field buying of perishables. All significant economies in these areas can apparently be obtained by a company with retail sales of \$500 million annually. *Enforcement Policy with Respect to Mergers in the Food Distribution Industries*, *supra* note 44, at 7.

⁶⁰ Mueller, *supra* note 27, at 26.

⁶¹ Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. ANTITRUST SEC. 9, 14 (1966). In summing up, Rowe observed, "[W]hile the bugles blow in the [Commission's] opinions, only death rattles croak in the complaints." *Ibid.*

The impact of the Commission's activity on price discriminations affecting competition on the seller's level alone can perhaps best be gauged by the simple statistic that, in the period 1963 to date, the Commission has issued three cease and desist orders of significance specifically directed at primary line discrimination.⁶² This is a disturbing record at a time when a prominent lawyer in this area has expressed the fear that "unregulated price discrimination would destroy the small businessman," explaining that in his day-to-day practice "[his] clients continually report to [him]—and current proceedings confirm—that large sellers still use territorial discrimination to destroy weaker competitors, and that volume buyers continue to bargain for unjustifiable preferences injurious to smaller purchasers."⁶³

In view of continuing and increasing concern with the question of the economic implications of overall concentration and conglomerate power—*i.e.*, the power to subsidize local operations and the power to discipline competitors—it is important that the Commission re-evaluate its role in pursuing price discrimination cases involving competition in the primary line.

The Commissioner's qualitative difficulties in this field stem primarily from two basic sources: First, an inability to define adequately the standard of illegality; and second, an inability to devise appropriate remedies.⁶⁴

A. The Standard of Illegality Inadequately Defined

The difficulty the courts and the Commission have had in coming to grips with the proper standard of illegality for primary line discrimination is exemplified by the *Anheuser-Busch* case.⁶⁵ In that case, respondent, a nationwide seller of beer, was charged with an illegal geographic price discrimination centering on the St. Louis market.⁶⁶ The Commission, focusing on the duration of the price differential, the fact that three of Anheuser's regional competitors during the period of the price reduction suffered a loss of sales volume as well as market share,⁶⁷ and the disparity in market power between Anheuser and its competitors, found the requisite injury.⁶⁸

In 1961, the Seventh Circuit reversed the Commission's finding of injury on the ground that the facts showed no more than a temporary diversion of business from competitors, rather than injury to competition, and that the Commission had failed to prove that Anheuser's price reduction caused "any present, actual injury to competition."⁶⁹ Reading the decision of the court, it is

⁶² *Dean Milk Company*, 3 TRADE REG. REP. ¶ 17357 (F.T.C. 1965), *appeal docketed No. 15,483*, 7th Cir., Dec. 15, 1965; *Lloyd A. Fry Roofing Co.*, 3 TRADE REG. REP. ¶ 17303 (F.T.C. 1965, *aff'd* Trade Cas. ¶ 71964 (1966); *Forster Mfg. Co.*, TRADE REG. REP. (Transfer Binder 1961-63) ¶¶ 16243, 16342 (F.T.C. 1963), *remanded to Commission*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965). *Commission opinion on remand*, 3 TRADE REG. REP. ¶ 17304 (F.T.C. 1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 35 U.S.L. WEEK 3234 (1967); *The Borden Co.* (Transfer Binder 1961-63) ¶ 16191 (F.T.C. 1962), ¶ 16279, 16308 (F.T.C. 1963), *rev'd*, 339 F.2d 133 (5th Cir. 1964), *rev'd*, 383 U.S. 637 (1966). Although in *Borden* the commission found a price discrimination with the requisite anticompetitive effect at the seller's level, it issued an order directed essentially to protecting secondary line competition.

⁶³ *Van Cise, No, Thirty Years Are Not Enough*, 30 A.B.A. ANTITRUST SEC. 28, 29 (1966).

⁶⁴ The Commission has seemingly been unable to reconcile the requirement of protecting competition from unfair price discrimination with the need of national and regional sellers to employ flexible pricing to meet the competitive exigencies peculiar to their various markets. The difficulty in framing orders meeting these prerequisites in turn has undoubtedly, in some cases, led the Commission and the courts to apply an unrealistic rigorous standard for finding a violation of the law where injury at the seller's level is concerned.

⁶⁵ *Anheuser-Busch, Inc.*, 54 F.T.C. 277 (1957), *rev'd*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1960).

⁶⁶ The price discriminations were marked by two price reductions—the first, effectuated on January 4, 1954, reduced the price from \$2.93 to \$2.68 per case, leaving a differential between Anheuser and local competitors of \$.33 per case. Thereafter, on June 21, 1954, respondent again reduced its price to \$2.35 per case—this time to match the prices of its regional competitors. The price reductions of 1954 remained in effect until March, 1955, at which time Anheuser increased its price \$.45 per case, which ultimately resulted in a new differential of \$.30 per case between Anheuser and the regional concerns after the three regional brewers had increased their price by \$.15, to \$2.50 per case. *Id.* at 298, 299.

⁶⁷ The Commission also noted that two of Anheuser's regional competitors, although they had been progressively enjoying smaller sales volumes for several years prior to the price reductions, had suffered a particularly large sales reverse in the period after Anheuser's price reduction. In the case of another regional competitor—Falstaff—the Commission found that this concern had been showing progressive gains prior to the price reductions and that, but for such trend, Falstaff would not have lost sales but would have experienced a substantial increase. *Id.* at 299, 300.

⁶⁸ Total market sales in the period increased 9.2 per cent, while Anheuser enjoyed an increase of 201.5 per cent in its sales in comparison to the preceding period. *Ibid.*

⁶⁹ *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. 1961).

difficult to escape the conclusion that, absent a finding of predatory intent, a finding by the Commission of probable injury will not be sustained in a primary line case.⁷⁰ The decision of the Seventh Circuit in *Anheuser* found its echo in a later Commission decision—*Quaker Oats*.⁷¹ Reversing the hearing examiner who had found a violation of section 2(a) in the primary line of competition, the Commission in *Quaker Oats* emphasized that it could not say that respondent's price differentials were a "punitive or destructive attack" or "impair[ed] the vitality and health of the process of competition."⁷²

In the period between 1963 and 1965, findings of competitive injury in two of the three proceedings resulting in orders directed specifically against primary line discriminations—*Forster Mfg. Co.*⁷³ and *Lloyd Fry Co.*⁷⁴—were supported by evidence of predatory intent on the part of the discriminator.⁷⁵ Although the Commission in *Fry* held that it was not necessary to find predatory intent, this case is not a clear precedent for that proposition since predatory intent was clearly present, and the circuit court, in affirming the Commission's order, obviously relied on the showing of anti competitive motive.

However, in *Dean Milk*,⁷⁶ the Commission found injury on the primary line without relying on a finding of predatory motivation with respect to the price cuts challenged in the proceeding; rather than depending on evidence of motive or intent, the Commission based its decision on the potential of Dean's price differentials to limit the competitive opportunities of its smaller competitors.⁷⁷

⁷⁰ In this connection, the court, ruling that Anheuser's pricing practices had been employed fairly and with restraint, held: "If it is using its competitive power fairly in the marketplace and respecting the rights of its competitors, then no forecast of future adverse effects on competition based on those facts is valid. If, on the other hand, the projection is based upon predatorialness or buccaneering, it can reasonably be forecast that an adverse effect on competition may occur. In that event, the discriminations in their incipiency are such that they *may* have the prescribed effect to establish a violation of Section 2(a)." *Id.* at 843.

Taking the opinion at face value, this language compels the inference that the court would be willing to apply the probability test of the statute only in those cases where predatory intent is established; namely, in those instances where the price discrimination is motivated by the purpose of destroying competition. Under this ruling it is unlikely that the Commission, whatever its market analysis, would be able to satisfy the statutory test if it does not find actual present injury absent a showing of predatory intent.

It is ironic that the Commission could apparently have found that Anheuser was motivated by the intent to restrain competition in instituting the price reduction. In this regard, the hearing examiner found: "[T]hese price reductions were ordered by its president for two admitted reasons: to get business away from its competitors, and to punish them for refusing to increase prices when A.B. [Anheuser] did so in the fall of 1953." In short, the examiner found the price cuts were initiated for the purpose of disciplining competition when it refused to raise prices in response to increased costs due to a labor contract. The examiner also found that after the price discrimination was ended, "apparently the lesson was well taught and better learned, because those three St. Louis breweries promptly followed A.B. up with price increases in March, 1955, and were careful to keep the price difference between them and it at less than the 33 cents whose elimination had cost them so much sales volume." 54 F.T.C., at 277, 292. (Emphasis added.)

The Commission passed over this finding of the examiner in its opinion without comment, although it did not disavow his findings on this point. Had the Commission turned its decision on this facet of the case, the decision of the Seventh Circuit might well have been different. See *Lloyd A. Fry Roofing Co. v. FTC*, 5 TRADE REG. REP. ¶ 17964 (7th Cir. 1966). It is difficult to see a more concrete showing of injury to competition than a price cut instituted by a large national company for the purpose of disciplining competitors for their failure to raise prices, a punitive measure which subsequently proved successful. Assuming the examiner was correct, there was damage to price competition over and above injury to competitors.

⁷¹ TRADE REG. REP. (Transfer Binder 1963-65) ¶ 17134 (F.T.C. 1964).

⁷² *Id.* at 22216.

⁷³ *Forster Mfg. Co.*, TRADE REG. REP. (Transfer Binder 1961-63 ¶¶ 16243, 16342 (F.T.C. 1963), remanded to Commission, 335 F.2d 47 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965), *Commission opinion on remand*, 3 TRADE REG. REP. ¶ 17304 (F.T.C. 1965), aff'd, 361 F.2d 340 (1st Cir. 1966), cert. denied, 35 U.S.L. WEEK 3234 (1967).

⁷⁴ *Lloyd A. Fry Roofing Co.*, 3 TRADE REG. REP. ¶ 17303 (F.T.C. 1965), aff'd, TRADE REG. REP. ¶ 71964 (7th Cir. 1966).

⁷⁵ In *Forster* there were express threats to run competition out of business, while in *Fry*, there was evidence that the discriminating seller, a multimarket operator and one of the major firms in the roofing business, instituted the price cuts in order to stabilize the market and to discipline local competitors for their lower prices. The record further evidenced the fact that in instituting these punitive price cuts, *Fry* was able to exercise price leadership which was followed by other majors in the field.

⁷⁶ *Dean Milk Co.*, 3 TRADE REG. REP. ¶ 17357 (FTC 1965), *appeal docketed No. 15,483*. 7th Cir., Dec. 15, 1965.

⁷⁷ The Commission concluded that Dean's quantity and other discounts (the prime factors in its unusual growth) prevented competitors from breaking into the wholesale market while at the same time initiating a trend away from home delivery. On the basis of these considerations, the Commission found that price differentials had profound effects on Dean's local competitors, including weakening their financial condition, which curtailed their opportunities to compete. The Commission also found that to some extent there had been actual alterations of market structure.

Since Dean's motives did not figure significantly in the decision, that proceeding should furnish an appropriate vehicle for the courts to again rule on the question whether the requisite impact on competition may be shown absent predatory intent or actual injury. The confusion over this issue does not stem from recent decisions alone. It is fair to say of the Commission's primary line cases generally that, while the holdings of the individual cases may clear enough, "the decisions have proliferated without forming recognizable patterns"⁷⁸ and a clear direction as to the proper test of legality in these proceedings is not discernible from the body of Commission precedent on this point.⁷⁹

B. A Workable Standard

To arrive at a workable standard, it is first necessary to cast aside some of the confusing antitrust jargon which has crept into the case law and the literature, thereby retarding the development of the law in this area—namely, the pronouncement that "diversion of business cannot be equated with injury" and the assertion that "antitrust is concerned with competition and not competitors."

There is some underlying truth in the slogans; but if uncritically applied, they are obviously inconsistent with Congressional intent in enacting the Robinson-Patman Act. First, it is perfectly obvious that if business diversion reaches a certain level, competitors will no longer be in a position to compete effectively, or at all, with the discriminating seller, particularly if the latter has substantial market power. The decision to be made, then, is not one of either completely rejecting or accepting the factor of business losses as a relevant determinant of the probability of anticompetitive effects between sellers. Rather, the question is one of deciding at what level, and in which context, diversion of business becomes a meaningful criterion.

Similarly, while it is conceivable that in some cases injury to, and even the disappearance of, competitors is simply evidence of that kind of competition which the antitrust laws were designed to protect,⁸⁰ it is equally clear that competitors are prerequisite to competition.⁸¹ Again, the question is not one of abso-

⁷⁸ Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 11 (1966).

⁷⁹ For example, the Commission opinion in *Anheuser-Busch*, does not take cognizance of the examiner's finding that the territorial price cuts were motivated by the desire to discipline competitors for their pricing practices, a crucial consideration in both the Commission's and Seventh Circuit's decisions in *Fry*. See note 70 *supra*. It is also impossible to reconcile the approach in *Anheuser*, where the Commission chose to rely on sales lost by competitors while passing over evidence of anticompetitive injury, with the decision in General Foods Corp., 50 F.T.C. 885 (1954), which dismissed the complaint pursuant to respondent's motion at completion of the Commission's case. General Foods, which discriminated geographically in the sale of pectin between two West Coast areas and the rest of the nation, increased its national market share from 62.2% to 80.5% at a time when the price cuts had been in effect for approximately six years. Its share of the market in the two areas affected by the price cuts increased to 62.2% and 69%, respectively. Local competitors of General Foods suffered substantial losses of market share at a time when the market was rising, although they did make some gains in dollar volume. *Id.* at 895-97. Further, General Foods' local competitors had been able to enter the market only after the former's patent monopoly on pectin had expired. The failure to find the likelihood of injury to competition on these facts, demonstrating use of power derived from General Foods' near-monopoly position, is difficult to understand. It becomes inexplicable in the light of documentary evidence from respondent's files indicating that the price cuts were instituted to stifle the growth of respondent's competitors: "[H]ad we not made it tough for M.C.P. as we did the last three years, they would have spread eastward at a much faster rate than they did and we would now be facing some pretty tough competition in the middlewest . . ." *Id.* at 894. (Memorandum dated November 30, 1942, obtained from files of General Foods, cited in the dissent of Commissioner Mead.)

The unifying thread in *Anheuser* and the *General Foods* opinions, which are otherwise seemingly founded on diametrically opposed reasoning, is the fact that both passed over, without comment, evidence that the price cuts were motivated by predatory purposes. This might lead to the inference that such evidence is not necessarily crucial in cases of this nature. The uncertainty on this issue is, however, compounded by the recent Commission opinion in *Quaker Oats*, which, although somewhat equivocal on this point, leaves the net impression that a showing of this nature is indispensable to a finding of a violation.

⁸⁰ See, e.g., H.R. REP. NO. 1422, 81st Cong., 1st Sess. 5-6 (1949): "Competition is a contest between sellers for the business of a buyer. In such a contest one seller gets the order while other sellers lose the order. That is competition. The seller who did not get the order may feel injured, but that does not mean that competition has been injured. In any competitive economy we cannot avoid injury to some of the competitors. The law does not, and under the free enterprise system it cannot, guarantee businessmen against loss. That businessmen lose money or even go bankrupt does not necessarily mean that competition has been injured. 'Competition,' Mr. Justice Holmes observed, 'is worth what it cost.'"

⁸¹ "There is a paradox in the antitrust laws. They expect companies to compete by offering constantly better goods and services at constantly lower prices for the consumer's benefit. They intend that the less efficient should fail, and that the most fit should survive. But when the economist's classic battle of competition ends with the elimination of the weaker, and survival of one or a few strong companies, it is suddenly realized that there is no longer any competition." Burns, *Antitrust and Robinson-Patman Act Problems—Intracorporate Problems*, 7 ANTITRUST BULL. 689, 711 (1962). See also Cellier, *Facts About Antitrust Myths*, 9 ANTITRUST BULL. 607, 611 (1964).

lutes but one which necessarily turns on the market power of the adversaries, the number of competitors in the market, and the structure of the market involved, including such characteristics as the extent to which sales volume is concentrated among a few, or dispersed among many, sellers.⁸²

Semantic difficulties aside, a test for predicting the impact of price discriminations affecting competition at the seller's level might well incorporate some of the criteria applicable to merger cases. Section 7 of the Clayton Act, of necessity, emphasizes predictions as to the viability of competition rather than competitors. Accordingly, a test incorporating criteria analogous to those applied under the merger act might allay the criticism that the Commission, by being unduly solicitous of competitors under the price discrimination statute, has followed a policy at variance with the general thrust of the antitrust laws.

The starting point in any market analysis must encompass an evaluation of the structure of the industry involved, including concentration and ease of entry. In industries in which sales are not concentrated and where entry is relatively easy, a diversion of business affecting only a few sellers not be significant. On the other hand, in those industries where sales are concentrated among a few sellers, a substantial diversion of business from significant competitors may well meet the statutory test. Further, price cuts or price differentials should be evaluated in the context of industry profit margins and the length of time in which they have been in effect. Again, it is clear that a price discrimination is more suspect if there is considerable disparity in market power between the discriminating seller and his competitors.⁸³

⁸² In a letter dated August 14, 1950, to the Chairman of the Senate Committee on Interstate and Foreign Commerce (cited in Purex Corp., 51 F.T.C. 109, 113 (1954)), the Federal Trade Commission stated that it could not make a distinction in sweeping terms between protection of "competition" against injury by price discrimination as opposed to protection of individual competitors. Citing the case of E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cr. 1944), a case in which two allied but separately incorporated companies were operated as a unit and had but one domestic competitor which they sought to drive out of business by sectional price discrimination, the Commission noted: "Injury to this competitor sufficient to threaten its continued existence was obviously injury to competition for this single competitor furnished the only competition the . . . respondents had. The Commission does not wish to be understood as stating that injury to a competitor in all cases constitutes injury to competition. The loss of a single sale as a result of price discrimination obviously constitutes an injury to the competitor who has lost the sale, but it does not automatically follow that competition is injured thereby." 51 F.T.C. at 113-14.

⁸³ In a case such as *General Foods* where a seller with near monopoly power diverts, by virtue of the price discrimination, significant amounts of business from his competitors, or where it is clear that the growth of its competitors has been inhibited by the price discriminations, the inference that the statutory test of injury has been met may well be justified.

In connection with the factor of the relative market power and market position of the discriminating seller vis-à-vis competitors, the recent Seventh Circuit decision in the *Fry* case has apparently relaxed the holding of the same court, in *Anheuser*, that, in addition to a consideration of the discriminating seller's market power, there should be explicit proof of subsidization of the price cut by the seller's other operations. In *Anheuser*, the court rejected the Commission's reliance on the examiner's finding that there was disparity in market power and resources between Anheuser and its competitors, apparently on the ground that income from the balance of Anheuser's operations had been used to stabilize the losses, if any, incurred in the St. Louis market.

The Seventh Circuit's decision in *Fry* seems to be more realistic. There the court rejected Fry's argument that there can be no violation of section 2(a) in an area price discrimination case unless the Commission also finds that the higher prices elsewhere support the lower prices in the market under examination. The court stated that no authoritative decision was cited to support this view and held further: "Congress and the cases assume that the 'higher price to purchasers supports the lower price to others.'" Lloyd A. Fry Roofing Co. v. FTC, 3 TRADE REG. REP. ¶ 17303 (F.T.C. 1965), citing AUSTIN, PRICE DISCRIMINATION 44 (2d rev. ed. 1959); S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. REP. NO. 2287, 74th Cong., 2d Sess. 8 (1936); S. REP. No. 698, 63d Cong., 2d Sess. 2, 3 (1914); H.R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914). The Court thereby held, in effect, that the presumption that higher prices elsewhere support the price cuts in markets under consideration is justified by proof of the discrimination. This is a realistic standard and may be applied at least to the extent that the profit margins in the areas where the higher prices are maintained are significantly higher than those in the market where the price cuts are manifested. Finally, proof that funds have actually been transferred from one operation or market to another should not be required. In such a case, the fact-finding body should be able to assume that the lower price is subsidized by the company's business as a whole or by higher prices in other markets. This seems to be in line with congressional thinking on this issue: "Every concern that engaged in this evil practice must of necessity recoup its losses in the particular communities or sections where the commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities. . . ." S. REP. No. 698, 63d Cong., 2d Sess. 1, 3 (1914). In the case of the Robinson-Patman Act, it was the concern of Congress that "discrimination in excess of sound economic differences between the customers concerned, in the treatment accorded them, involve generally an element of loss, whether only of the necessary minimum of profits or of actual costs, that must be recouped from the business of customers in other States and denied to those within the State, they involve the use of that interstate commerce to the burden and injury of the latter. . ." H.R. REP. NO. 2287, 74th Cong., 2d Sess. 8 (1936). See also S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936).

1. Identity of Competitors—A factor to be considered in evaluating the effects of discriminations on the seller's level is the identity of those in the particular market who have been the primary source of price competition. A number of cases, as well as economic studies, suggest that in some industries, where much of the sales volume of the market is concentrated in the hands of a few sellers, nonprice competition is likely to flourish;⁸⁴ any price competition which exists will be generated by smaller, local or independent companies whose market power is of such little magnitude that their larger competitors are likely to disregard their activities entirely. If it appears that price cuts by dominant firms will, as a result of loss of business, lowered profits, or other factors, make it more difficult for such independent concerns to continue to supply the leaven of price competition in their particular industry, it may be justifiable to infer that the statutory standard has been met.⁸⁵ A meaningful antitrust policy requires that competitors of this nature survive, for it is they who provide competition.

2. Price Discrimination as a Source of Barriers to Entry—In evaluating the effects of price discrimination on competition at the primary line, consideration should also be given to the fact that, aside from diversion of business from competitors, which may or may not have the requisite anticompetitive effect, discriminations of this nature may also result in barriers to new competition as well as to effective competition on the part of sellers already in the market. In short, price discrimination may affect the structure of the market without causing the disappearance of competitors. For example, volume discounts may serve as substantial barriers to entry when used by a larger, diversified supplier. In such cases, the volume discount may foreclose a customer to the supplier's competitors unless they are able to supply all the requirements of the customer.⁸⁶ In such cases smaller competitors of a large supplier may never be able to expand their markets beyond that of the smaller customers.⁸⁷

Where product differentiation exists as a barrier to entry, this factor and the impact of a price discrimination are likely to be mutually reinforcing. This may occur in the case of potential new competition as well as in the case of those sellers already in the market who have been unable to increase the consumer acceptance of their product by advertising or by other methods of promotion. Discriminatory price cuts will magnify the advantages of sellers enjoying consumer preference flowing from product differentiation, since vendors without that advantage must sell at prices below those of the advertised brand or invest heavily in advertising or other promotional activity in order to generate sales volume capable of achieving economies of distribution and production. Under such circumstances, if the need to meet a discriminatory price-cut forces competing sellers faced by the product differentiation barrier to lose necessary profits

⁸⁴ The observation of the Supreme Court, in *United States v. Aluminum Co. of America*, 377 U.S. 271, 280 (1964), although it involves a merger case, is pertinent here: "As that condition [oligopoly] develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge. That tendency may well be thwarted by the presence of small but significant competitors." See also BAIN, *op. cit. supra* note 34, at 33.

⁸⁵ For a discussion of the power of conglomerate firms to discipline competitors, see testimony of Corwin Edwards, *Concentration Hearings*, pt. 1, 44.

There is evidence that in some industries it is the independent, smaller competitor who affords significant price competition. In the oil industry, according to Dr. Alfred Kahn, Professor of Economics, Cornell University, major companies are inclined to compete with one another more in improving the quality of their products and increasing consumers' acceptance of their brands than in reducing their prices in order to increase sales. The smaller competitor in the petroleum industry, who has neither the security nor the investments of its larger rivals, will characteristically use price more willingly and flexibly to attract customers for its products when demand is slack and increase prices when demand is strong. The independents, according to this witness, plays a role entirely disproportionate to their size in keeping markets competitive, flexible and dynamic. *Concentration Hearings*, pt. 2, 597. In the roofing industry, the importance of independents for maintaining price competition has been demonstrated by the *Fry* case. The same may hold true for the beer industry, where there is an indication that Anheuser's price cuts were for the purpose of disciplining small competitors who failed to raise their prices in response to a cost rise. See note 70 *supra*.

⁸⁶ Brooks, *Volume Discounts As Barriers To Entry and Access*, 69. J. POL. ECON. 63, 64 (1961).

⁸⁷ *Ibid.* See also Bausch & Lomb Optical Co., 28 F.T.C. 186 (1939); American Optical Co., 28 F.T.C. 169 (1939). In *American Optical* the Commission held: "The tendency of the cumulative . . . discounts is to induce the retailer whose purchases are little more than enough to qualify therefor to group all his purchases with the respondents' wholesale branch . . . [T]o that extent [the plan] prevents freedom of competition for such . . . business on the basis of price, quality and efficiency of service." *Id.* at 181-82.

or to sell at a loss, the requisite effect on competition may have been demonstrated even when there has been no diversion of business.⁸⁸

3. Probability of Future Violations—Finally, a crucial factor in considering the potential danger of a price discrimination to competition at the seller's level is whether the discrimination is likely to be resumed in the future, and if so, the extent to which such resumption will impinge upon the projected level of competition. Under the Robinson-Patman and Clayton Acts, unfair trade practices are to be dealt with before they ripen into full bloom. It would be, therefore, inconsistent with the statutory purpose for the Commission to suspend enforcement simply because the price discrimination which came to fruition was of short duration.

The Commission should not apply a subjective test.⁸⁹ Rather, the test should be oriented toward resolving the problem in light of the company's capabilities, the structure of the market, and the economic forces governing firms in that market. In short, the Commission's decision to act should be predicated upon a finding that the interaction of these factors is *likely* to cause the seller to resume the proscribed activities and not upon whether the seller *in fact* intends to resume such activities.⁹⁰ A test of this nature is not only more realistic but also provides a standard which is more susceptible of extrinsic proof.

4. Statutory Objectives.—In applying the test of competitive injury in primary line cases, the trier of fact should bear in mind that the objective of the Clayton Act, as amended by the Robinson-Patman Act, is to protect efficient sellers who may be able to compete on the merits of their products and services but who do not have the resources to withstand price differentials flowing wholly from a competitor's ability to finance discriminatory price cuts having no relation to the efficiencies of production or distribution.⁹¹

C. Formulating Effective Remedies

As crucial as the criteria for determining whether the price discrimination has had the requisite effect on competition in the primary line is the question of whether the violation—once it has been demonstrated—can effectively be prevented from recurring. Here, again, the Commission's record in the last few years has not been reassuring. The three cease and desist orders issued by the Commission in the period between 1963 and 1965, directed against primary line discrimination, present difficult problems of construction and application.⁹² These difficulties suggest that new remedial approaches be considered.

The fundamental problem, particularly in geographic price discriminations, is to frame an order which will prevent future price discriminations injurious to the seller's competitors without, at the same time, imposing on nationwide companies price uniformity incompatible with the conditions of the heterogeneous markets which they serve.⁹³ The difficulty of achieving this objective may be responsible in large measure for the fact that many primary line orders—even where predatory intent has been demonstrated—have been too narrowly drawn. As a result, although they have not interfered unduly with the seller's pricing

⁸⁸ The effect of product differentiation in the context of price discrimination has already been noted. See, e.g., Commissioner Mead's dissent in *General Foods Corp.*, 50 F.T.C. 885, 892 (1954). In this connection, it seems the *Purex Corp.* decision, 51 F.T.C. 100 (1954), erred in relying, among a number of other reasons for dismissal of the complaint, on the finding that injury to certain competitors resulted also from Purex's advertising campaign as distinguished from the price cuts. *Id.* at 143, 164. A more realistic approach would be to consider the two phenomena together.

⁸⁹ Compare *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964), where the Court held that the question of potential entry was not to be determined by a subjective test but rather by a structural test turning on the question of the likelihood of the company, in a specific situation in a particular market setting, entering that market.

⁹⁰ Consider, for example, a market in which it appears that sales are concentrated among a few leading sellers endowed with market power and that they are engaged in parallel policies to their mutual advantage, while, on the other hand, price competition is furnished only by a number of small or local concerns and in which it further appears that the price discrimination is apt to discourage further price competition on the part of these concerns. Under such circumstances, it might easily be inferred that it would be to the discriminating supplier's interest to resume the price discrimination at some future time in order to stabilize the market.

⁹¹ Cf. *Forster Mfg. Co. v. FTC*, 335 F.2d 47, 56 (1st Cir.), cert. denied, 380 U.S. 906 (1964).

⁹² See note 62 *supra*.

⁹³ The problem does not exist to the same degree in cases where a primary line order is not intended to deal with geographic price discriminations, and this discussion is limited primarily to the question in the case of price differentials between various trade areas.

flexibility, it is unlikely that they will effectively prevent resumption of the discriminatory practices enjoined.

Typical of recent primary line orders issued by the Commission was the order in the *Fry* case.⁹⁴ There, *Fry* was prohibited from discriminating by selling at a price lower than the price charged any other purchaser at the same level of distribution, where such lower price undercut the lowest price offered to that purchaser by any other seller having a substantially smaller sales volume than *Fry* in the sale and distribution of roofing products.⁹⁵ This order contains a number of built-in obstacles to effective enforcement. The primary objection to orders of this nature is the requirement that the seller must undercut a competitor with substantially smaller sales volume. Under the terms of the order, although there is no express requirement to this effect, it may well be necessary to show that the firms subject to its provisions knew, or should have known: (1) that their competitors were smaller; and (2) that they were undercutting. This may be difficult to establish and is objectionable, as a practical matter, since it would incorporate into enforcement of the statute proof of knowledge which is otherwise irrelevant both to the provisions of the Act and to the legislative intent.

There is the additional danger that proof of knowledge may become confused with the concept of predatory intent. Should this occur, the task of enforcement would be immeasurably more difficult. Further, at a time when the phenomenon of product differentiation is assuming increasing competitive significance, a requirement that a lower price must undercut a smaller competitor's price would, in effect, permit price discriminations with which smaller, local sellers, in competition with larger firms having that advantage, could not compete. Under provisions of this nature, large sellers with product differentiation advantages would be permitted to discriminate in price so long as their price is not lower than that of their local competitors, even though the latter—if they do not have consumer preference resulting from product differentiation—cannot competitively sell their product except at a lower price. It is conceivable that under such a provision, larger diversified firms could force a smaller rival's price down to ruinous levels without the terms of the order ever coming into effect!

Similarly, the requirement in some of the orders that the price discrimination—even though a territorial discrimination—must be at the same level of distribution, may frustrate the intent of the Act insofar as it appears to sanction functional discounts irrespective of whether or not the price discrimination has the requisite effect on competition. It is conceivable, in a number of situations, that profits from sales at one functional level may be used to subsidize price discriminations at another level of distribution.⁹⁶

The fundamental problem posed by discriminations affecting competition on the primary line is the opportunity which the large firm has for utilizing its resources outside of the market or submarket where the lower price of the discriminator is charged to subsidize the differential. This suggests that, in the search for a remedy, at least in the case of geographic price discriminations, the Commission might consider a departure from its single-minded focus on the submarket where the lower price is charged, such as in the *Fry* order. Some consideration might be given to requiring those firms who have violated the price discrimination statute to keep records demonstrating that price differences between customers in various markets or submarkets are justified on the basis of cost differentials in the areas involved.⁹⁷ The requirement of financial reports by division (or other appropriate corporate category) not only would facilitate the analysis of the competitive impact of the activities of the

⁹⁴ 3 TRADE REG. REP. ¶ 17303 (FTC 1965), aff'd, TRADE REG. REP. ¶ 71964 (7th Cir. 1966).

⁹⁵ "IT IS FURTHER ORDERED that respondents . . . directly or through any corporate or other device, in connection with the sale or offering for sale of asphalt saturated felt and asphalt shingles in commerce, as 'commerce' is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality, by selling such products to any purchaser at a price which is lower than the price charged any other purchaser at the same level of distribution, where such lower price undercuts the lowest price offered to that purchaser by any other seller having a substantially smaller annual volume of sales of asphalt roofing products than respondents' annual volume of sales of those products." *Lloyd A. Fry Roofing Co.*, Dkt. No. 7908 (FTC July 23, 1965).

⁹⁶ See *Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

⁹⁷ Once a violation of law has been demonstrated, the party involved must expect "some fencing in." *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957).

conglomerate or geographically diversified firm⁹⁸ but also would be in harmony with the text of the statute, which expressly allows cost justification as a defense. Moreover, such an approach to the problem, to some extent at least, is suggested by the legislative history.⁹⁹

This approach has a number of advantages which merit consideration. An order of this kind would tend to discourage discriminations in prices not reflecting efficiencies in the market where the lower price is charged, and might, as a result, preclude those discriminations, subsidized by operations outside the market under consideration, with which the enforcement of the Act in primary line cases is cost concerned.¹⁰⁰ At the same time, a requirement of this nature would permit, and perhaps even encourage, a company to adapt its pricing policies to the varying conditions in the market in which it sells. Finally, such a remedy would serve to promote the competition which the Robinson-Patman Act, and antitrust generally, is designed to nurture: namely, competition on the basis of efficiency in production and distribution rather than on the basis of disparity of capital resources.

V. CONCLUSIONS

In implementing the national policy which relies on competition to regulate and improve the performance of markets, enforcement of the Robinson-Patman Act and section 7 of the Clayton Act should be regarded as complementary. Further, assuming that it is not practical, under the antitrust laws, to restructure the entire economy to make it perfectly competitive, enforcement of the price discrimination act, despite some suggestions to the contrary, must receive continuing attention. Both statutes are concerned with concentration and its effect on competitive performance. Increasingly, with the blurring of boundaries between various industries resulting from the drive for diversification, the most pressing antitrust problem becomes one of analyzing the competitive impact of the large conglomerate concern on single product and local geographic markets.

Where there is disparity of market power, discriminatory pricing practices can effect significant structural changes in a market. Modifications of this kind are not brought about by mergers alone. This is particularly evident in a number of industries which, to a large extent, consist of smaller, local concerns with narrow product lines. Firms of this nature are increasingly coming into competition with large, multimarket, diversified concerns. Where such inequality of market power exists, the mere prohibition of further mergers is not enough. In the case of the dairy industry, for example, "it is imperative that even if the Federal Trade Commission succeeds in its merger complaints, every effort be made to prohibit large firms from accomplishing by pursuing discriminatory practices that which it was intended that they be prohibited from accomplishing through illegal mergers."¹⁰¹

The Commission must clearly evidence its intent to enforce the Robinson-Patman Act to prevent unfair trade practices such as price discrimination; otherwise, a climate will be created where even those concerns which can compete on the basis of efficiency with large diversified sellers will lose the incentive to do so because they simply do not have the capital to combat price discriminations by firms with superior financial resources. The Robinson-Patman Act has an important part to play in furthering the national policy of competition in those

⁹⁸ See note 33 *supra*.

⁹⁹ See note 83 *supra*.

¹⁰⁰ In this connection, see the suggestion that where a price discrimination does not increase total revenues or maximum profits but rather results in a decrease, such behavior has the same anticompetitive consequences as predatory tactics. According to this reasoning, if the price cuts in the submarket are insufficient to increase the seller's total revenue, the prior price must have been more profitable. Under this view, marginal firms would be eliminated in such a situation and their market shares divided among the survivors. The advantages of the temporary price cut to the consumer would, accordingly, be outweighed by the resultant increased concentration and tendency toward monopoly inconsistent with an efficient system of distribution. Comment, *Competitive Injury Under the Robinson-Patman Act*, 74 HARV. L. REV. 1597, 1605 (1961).

¹⁰¹ Testimony of Willard F. Mueller, then Professor, Department of Agricultural Economics, University of Wisconsin, *Hearings Before the Special House Subcommittee of the Select Committee on Small Business, Small Business Problems in the Dairy Industry*, 86th Cong., 2d Sess. 770 (1960). "[I]f these large firms are prohibited from using mergers in their . . . growth, they may still reduce competition and tend toward monopoly if they are permitted to use discriminatory practices against their smaller competitors. In fact, it is the opinion of some industry spokesmen that prohibiting mergers alone will not prevent a tendency toward monopoly because often it is cheaper to destroy a small rival than to buy it." *Id.* at 769.

instances where capital inequalities, rather than economies of production and distribution, appear decisive in the rivalry for trade.

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Unless the Commission can inspire confidence in the business community that it is prepared to enforce the Robinson-Patman Act effectively and imaginatively, the enforcement of section 7 alone to retain a competitively structured economy is unlikely to be successful in many industries. It behooves the Commission, therefore, to bring the same adaptability and flexibility to bear on problems arising under the Robinson-Patman Act to meet new situations which it has manifested in meeting problems of first impression under the merger statute.

Commissioner MACINTYRE. A number of the critics of the Robinson-Patman Act, such as the authors of the Neal report, call, in the name of competition, for revision of the Robinson-Patman Act drastically reducing its scope, while at the same time advocating a direct attack on concentration in industry, by a number of means including apparently dissolution suits. It is ironic that the advocates of a direct attack on concentration should at the same time urge abandonment of the challenge to price discrimination.

Now, in your record, the printed record of these current hearings, at pages 304 and 317 you will find the recommendations of the Neal report, and at the page I have said earlier, 282 of your record, you will find the recommendations of the Stigler report, as well as at 409, the recommendations of the ABA Commission to study the Federal Trade Commission.

I think that those recommendations deserve the very careful consideration of this committee before it makes a report to the House of Representatives, because not only did they fail to make recommendations for a strengthening of the laws against antimonopoly actions such as price discrimination, but the Neal and the Stigler reports would have turned the clock back to a point before 1914 in the public policy against antimonopoly practices.

In that connection, I would like to read you a sentence or two from a statement I made in testimony before a Senate committee recently.

It behooves the Congress to read these proposals and to reflect over the possibilities. How many Members of Congress, knowing as they do the thinking of the electorate, will vote for legislation which would operate to dissolve a large number of leading corporations of this country? Perhaps two or three or four hundred of them. Your answer to that question will provide answer as to whether the principal proposal in the Neal report is practical.

In this connection, I would like to associate myself with the statement on February 6 of Prof. Robert C Brooks, Jr., before your subcommittee that predation and exclusion have had a substantial and direct impact on industry structure. The rationale behind a policy advocating industrial deconcentration while adopting a permissive posture to practices directly responsible for such concentration I cannot explain and I wonder whether anyone else can, with any degree of success. It simply does not make sense to confine antitrust enforcement to combating undesirable market structure alone while permitting those practices which generate such concentration to go scot free.

Moreover, as a practical matter, such proposals are a call for non-enforcement of antitrust. The approach envisaged under the Neal report's "Concentrated Industries Act" involving in all likelihood, as I have said, large scale dissolution is unlikely to receive congressional sanction. I just wonder whether people as intelligent as those on that

committee were supposed to be could see through that. Thus, the Neal report, if its recommendations on price discrimination are followed would inhibit challenges of anticompetitive behavior, but nevertheless would be unlikely to generate a serious challenge to economic concentration.

My views as to the practical consequences of a course ignoring anti-competitive conduct and focusing on structure alone are to a considerable degree derived from the Commission's experience with the dairy industry. Beginning in the midfifties, the Commission issued a substantial number of complaints to bring to a halt a wave of mergers in the dairy industry. I referred to this earlier. By and large these proceedings were brought to a successful conclusion. Most national major dairy firms are under Commission order prohibiting future acquisitions of their competitors. The merger wave in this industry has been halted in large part, but nevertheless concentration increases. With the passage of time, it became evident that small and not so small dairies were disappearing simply because the competitive climate was no longer viable for them. Many of these firms were up to date sizable competitors, but were unable to continue, not because of inefficiency, but rather because of their financial disadvantage, *vis-a-vis*, multi-market conglomerate firms.

The Commission is frequently besieged with pleas from independent dairymen requesting that they be permitted to sell their businesses to large national firms under Commission order before their assets are further wasted as a result of unfair methods of competition. The erosion of the Robinson-Patman Act has contributed positively to increasing concentration among dairy firms. On the basis of my experience, this segment of the economy is a classic example of an industry where an approach devoted to structure alone, while glossing over anticompetitive behavior such as price discrimination, has, of necessity, been self-defeating.

Now in that connection I would like to read to you from some other testimony given before your committee on this very point more than 10 years ago by a very distinguished economist. He is teaching at Wisconsin at the present time. He was formerly Director of Economics at the Federal Trade Commission, and Chief Economic Adviser to the Federal Trade Commission for a number of years, and is particularly noted as one well-versed in the problems of mergers, and arising from mergers. This was Dr. Willard F. Mueller, and he said:

If these large firms are prohibited from using mergers in their growth, they may still reduce competition and tend toward monopoly if they are permitted to use discriminatory practices against their smaller competitors. In fact, it is the opinion of some industry spokesmen that prohibiting mergers alone will not prevent a tendency toward monopoly because often it is cheaper to destroy a small rival than to buy it.

Now, there is a man with considerable experience and considerable background on this problem, and I consider that analysis still valid today.

In implementing the national policy, relying on competition to regulate and improve the performance of markets, the enforcement of the Robinson-Patman Act and section 7 of the Clayton Act should be regarded as complementary. Similarly should the Robinson-Patman Act be repealed or rendered nugatory by ineffective enforcement, Sher-

man Act proceedings could not fill the gap. The price discrimination statute which deals with restraints of trade in the seed rather than the weed, is a prophylactic statute. The Sherman Act comes into play when the damage has been done. Congress with good reason therefore determined in 1914 and again in 1936 "that the Sherman Act alone was inadequate to accomplish its purpose." It is far more difficult to restore competition once crippled or destroyed than to maintain it in an already viable climate. To maintain competition in being is of course the primary function of the Robinson-Patman Act.

Since it is not practical under the antitrust laws to restructure the entire economy to make it perfectly competitive enforcement of the price discrimination act must and should receive continuing attention. Unless the Commission clearly evidences its intent to prevent such anticompetitive behavior, a climate will be created where even those concerns which can compete on the basis of efficiency will lose the incentive to do so because they do not have the capital resources to combat price discrimination by firms with superior financial resources. The Robinson-Patman Act has a vital role to play in furthering competition in those instances where inequality of capital rather than economies of production and distribution appear decisive in the rivalry for trade.

Up to this point, I have addressed myself primarily to the price discrimination provisions of section 2(a) of the law. Sections 2(d), 2(e), and 2(c), relating, respectively, to payments for advertising or promotional services, the furnishing of services, and brokerage payments, of course, also have a significant role to play in the statutory scheme. Nevertheless, current suggestions delineating criteria for Commission enforcement of these provisions would essentially negate the congressional intent behind their enactment. For example, the ABA Commission To Study the Federal Trade Commission, relying on a "large and growing body of uniformly critical opinion," questioned, without supporting documentation, enforcement of these particular sections of the Robinson-Patman Act. The ABA's solution would require the Commission to confine its enforcement of these provisions "to cases in which injury to competition exists." The difficulty with this approach lies in the fact that it contravenes directly the statutory text and Supreme Court interpretation of the provisions in question. In enacting sections 2(c), 2(d), and 2(e), Congress intended that practices within their scope should be the subject of an absolute prohibition to prevent evasion of section 2(a) by hidden price discriminations. The reason for incorporating an absolute prohibition in the so-called *per se* or quasi *per se* sections of the act are, of course, perfectly rational.

The object was to force price discriminations into the open where they would be more readily detected and where it would be easier to make accurate comparisons with alleged cost savings. Clearly, the prohibitions in question do have a sound legislative basis. In any event, it is not the Commission's function to question the economic wisdom of Congress in the framing of this law. To require the making of a finding of injury to competition, a condition precedent to bringing an action to enforce subsections 2(c), 2(d), and 2(e), would clearly derange the statutory scheme enacted by Congress. The Commission, of course, must have an order of priorities in determining which cases

should be brought. This may be determined on the basis of factors such as importance of the industry involved or substantiality of the practice under consideration. However, turning the question of whether to proceed on the basis of a criterion specifically rejected by Congress would amount to a de facto revision of the law by an administrative agency without benefit of law. Such a course would not be consistent with the Commission's function as an arm of the Congress.

The current debate over the Robinson-Patman Act generated by criticism implicitly advocating administrative erosion is crucial for a number of reasons. It involves, over and above the substantive issues, the role of this agency in relation to Congress. For practical reasons, the Federal Trade Commission has a great deal of discretion in determining the focus of its law enforcement efforts under the Robinson-Patman Act, as well as the other statutes which it administers. The Commission simply does not have the resources to pursue violations across-the-board in the case of these laws, desirable as this might be. As a result, it must pick and choose among conflicting claims for its attention. In the guise of reordering priorities, a process of necessity governed by the value judgments of individual Commissioners, the agency may lose sight of the Congressional intent, which I hope will not be done.

At this time, the greatest danger to the Robinson-Patman Act, therefore, resides in agency inaction, in any one of these areas. When the Commission decides to close a case there is no appeal and very little publicity. As a result, it is difficult for the outsider to determine the direction of Commission enforcement under this law. The Robinson-Patman Act has a vital role to play in antitrust enforcement. Legislative oversight by committees such as yours, and visible Congressional support are therefore critically needed if the statute is to fulfill the legislative intent. Responsible Government demands that whatever statutory revision is desirable should result from Congressional action rather than administrative default.

Gentlemen, I appreciate, as I said, the opportunity to appear before you. I trust that what I have presented will be found to be useful in your consideration of this problem.

Any questions you may have, I shall try to accommodate you with an answer.

Mr. HUNGATE. Thank you, Commissioner.

First let me express the committee's appreciation for your thoughtful and well-considered statement that you offered us on this problem.

I would like to inquire, I was interested in your statement, I think, on page 12 of your statement, "The Commission is frequently besieged with pleas from independent dairymen requesting that they be permitted to sell their business to large national firms under Commission order before their assets are further wasted by unfair methods of competition."

What recommendation would you have, if any, to this committee as to the way to meet that sort of problem or improve the way we handle it, perhaps?

Commissioner MACINTYRE. Well, this is a very difficult question. I think for the most part it is a matter that the Commission will have to address itself to in its further consideration.

Mr. HUNGATE. Pardon me, Commissioner. Would it be your view

that if the Commission had an appropriate policy or had a policy that it would be within its jurisdictional powers to intervene and act to halt these unfair methods of competition?

Commissioner MACINTYRE. Well, that's the first thing. I think the Commission has failed over the last 25 years to effectively halt these practices in a way provided by the law.

Now, that is an unqualified statement, but I think the record supports it.

If that had been done, I don't think we would be faced by all of these pleas today, by some of these small business dairy firms for approval for their sale to a larger firm.

Let me give you an example.

I, back about 10 years ago, made an investigation, it was not for the Federal Trade Commission, it was for another body, of a situation in the State of Florida. In the central part of that State was a middle-sized, very efficient, viable dairy processor and distributor. His plant was the most up-to-date in the country. His costs were about as low as anyone could expect the cost to be in such a plant. And, in fact his cost of his raw materials were probably less than for most processors and distributors because he produced, through the ownership of over 1,200 cows, approximately 50 percent of the milk he distributed.

My recollection of these figures, I believe, is not very far off. It was something like—his cost was about 41½ cents for a half a gallon in paper, in sales to stores.

But there came a day when he found that those stores were being offered half a gallon paper at 41 cents in his territory, and these were shipped in from outside of his territory.

I just do not believe that those sales at 41 cents covered the cost of the seller involved. This man told me at that time that he was facing a loss of about \$60,000 a month as long as this lasted. Fortunately it didn't last long enough to completely bankrupt him, but it is an example of what can happen.

Mr. HUNGATE. Pardon me, Commissioner. I wondered something about what this past experience is and what the future hope might be in situations like that. Do people address their complaints to the Commission or does the Commission initiate complaints over the past 20 years, or what has happened?

Commissioner MACINTYRE. Yes, sir, I could tell you what happened in that particular instance.

At that particular time there was a case in adjudication, in litigation at the Federal Trade Commission involving that particular seller. Now, when I made this particular investigation, I did it for a congressional committee. When I brought the results of this back to the House of Representatives, I was asked by the chairman of the particular committee involved to please report these facts to the Federal Trade Commission so that they would be enabled to know about it and determine whether to have them made a part of the record of that particular case.

I went to the Federal Trade Commission personally to present these facts, and to all of the staff members who were involved in the presentation of that particular case, I laid it out before them; but I was told that there was not time to go to Florida to hold a 1-day hearing to put these facts in that particular record, that there were other cases

that needed the attention of these particular trial attorneys, they went on out on the other cases, completed the case against that particular seller and then lost the case later.

This has been too frequently the case, Mr. Chairman, in the past years.

Mr. HUNGATE. I wonder if we have any recommendation to offer some hopes to improve this practice? It seems to me that those who criticize and say, well, some I think would go as far as to abolish or they would say we are failing, we are not meeting this problem, what would you suggest as a method to improve operations in situations just like that?

Commissioner MACINTYRE. Again I refer to what I said when I was talking about the National Dairy Products case. I said there, when I was referring to that case, that the finding of the Commission in that case, and that was one that was finally completed, was not solidly supported by the Commission. The lack of support for the public policy involved in this law is, in my opinion, one of the biggest problems at the Federal Trade Commission. It is not only the Federal Trade Commission. There are some other lawyers in Government, in other agencies of the Federal Government, that felt the same way and feel the same way. That is, they have bought these arguments attacking this law—lock, stock, and barrel.

In other words, they believe the arguments in the Neal and Stigler reports.

Mr. HUNGATE. I have just a couple of questions here.

We have had testimony here from, I believe, Professor Posner earlier in the hearings, his statement, "First the act, Robinson-Patman Act, although it wears the clothing of, seems designed rather to promote than prevent monopolistic pricing practices," and then it continues on, "The public interest is not served so far as I can see by securing food brokers, wholesale grocers, retail druggists against impending inroads of the chain stores, mail order houses and other innovative methods of distribution."

Would you comment on that, Commissioner?

Commissioner MACINTYRE. Well, I really don't particularly relish dignifying that particular statement with a comment.

However, I will say this. I know of no other statement that I so thoroughly disagree with than I do that particular one.

Mr. HUNGATE. Now, let me quote some other testimony that we have had before us here. Mr. Williams Jones, professor of law at Columbia University:

Shall we seek to encourage competition with a view to lower prices and to improve products for all consumers, or shall we seek to protect a privileged group of selected small businesses against the rigors of the competitive market? For me the answer is clear, small businessmen should not be the recipients of special protection at the expense of the consuming public.

Would you have a comment on that statement?

Commissioner MACINTYRE. Again it is a statement with which I cannot agree, and I would like to give an example of some things upon which I base my disagreement.

Back about 12 years ago I was helping conduct an investigation for a committee of the Congress, and was out in Missouri and it involved

the sale of milk. Just to the north of the city there, there is a little town of Mexico, Mo., a very small town, there was a small third-generation processor and distributor of dairy products. He was selling in glass gallon jugs, I believe, for the most part, and his competitors didn't like the prices he was charging. Now, one of those competitors moved in there and started to cutting the prices.

My recollection is that the price in smaller containers like quarts and halves was about a dollar a gallon at the time and he was selling at something like 80 or 90 cents a gallon in glass, in jugs, but they kept cutting the price to force him to make a decision that would raise the price, apparently, until the price of milk by the large distributors reached a level of 6 cents, wholesale, for one half-gallon in paper, 8 cents in retail at the retail store.

Now, the raw milk, from the dairy farmer, was being sold at a cost of almost 40 cents a gallon, so you can imagine how long this small fellow could last under those circumstances.

Well, we took some testimony out there by some of the housewives. They, just as Mr. Jones in that particular instance, thought it was very nice today to buy milk at 6 cents. In fact, one of them said she had filled her deep freeze with about 40 or 50 half-gallons, froze them hard to keep them for awhile, but the facts turned out that within a matter of about 3 years the independent dairyman was gone from that area. She was never able thereafter to buy milk at 6 cents or 8 cents, and I think the history of what she is paying today in Mexico, Mo., would be a good answer to Mr. Jones. He ought to look into that.

It happens that the big seller involved was later indicted by a grand jury for engaging in practices of that kind, and was convicted.

Mr. HUNGATE. I hope he wasn't from Missouri, too?

Commissioner MACINTYRE. No.

Mr. HUNGATE. Seriously, I appreciate your ability there to put flesh on the bones. I mean we have talked about theories and statutes and your examples are very helpful in bringing the facts to us.

Commissioner MACINTYRE. I certainly wish Mr. Jones could have had some of these facts brought to his attention before he made that statement.

Mr. HUNGATE. Do you think a personal visit between him and that small dairyman might have enlightened him somewhat?

Commissioner MACINTYRE. Well, maybe if he had had a dozen or so.

Mr. HUNGATE. Mr. Horton?

Mr. HORTON. Mr. Chairman, thank you.

Commissioner MACINTYRE. I want to ask you, on page 14, in the first paragraph you make the statement:

The Robinson-Patman Act has a vital role to furthering competition in those instances where inequality of capital rather than economies of production and distribution appear decisive in the rivalry for trade.

Now, I would appreciate your expanding on that. I think that statement bears a lot of consideration and especially in the current problems that the small businessman faces. Perhaps you might amplify that statement a little bit.

Commissioner MACINTYRE. Yes, sir. In that connection I would refer you back to what I have said, commencing on page 5 and through page 6, about what occurred in that instance.

Now, the facts which were found, made a matter of record and were found in that instance, showed that many of the small competitors in this Middle Atlantic area did not have the resources to sustain losses such as their large competitor did, who discriminated in price in that instance. Sales were being made at a loss by virtue of this discrimination but they couldn't sustain the loss as the large competitors could.

Mr. HORTON. Well, I was interested in this inequality of capital.

Commissioner MACINTYRE. Well, I think that is a good example. Here was the discriminator in that instance—it was a concern doing about \$1,200 million business a year and having considerable assets, competing with these people that were doing \$50,000 to \$100,000 worth of business a year, some of them maybe somewhat more than that, with very limited assets, very limited assets, so when that large one chose to just subsidize these discriminations with a loss of \$1,300,000, it was obvious they could not compete with his loss, they didn't have the money. It was an inequality in financial resources.

Mr. HORTON. The next point is, you made the statement that the Robinson-Patman Act has a vital role in furthering competition.

How does the Robinson-Patman Act help in that situation? I think that is the point that I would like to have you address your attention to. I think it would be very helpful to have the record show your comments on this.

Commissioner MACINTYRE. Well, I would like to return to the example that I gave a few minutes ago, which is hypothetical, about the sand and gravel.

If it were not for Robinson-Patman Act, and you were to allow the large sand and gravel firm in Washington and the one in Philadelphia, to just raise their prices indiscriminately, systematically and regularly between here and Philadelphia, the consumer could pay \$12 or \$14 a ton for their sand whereas they are paying probably \$4 today.

By virtue of applying the law so that that discrimination will not be carried on, the Robinson-Patman Act can help consumers and help competition by keeping prices down.

Mr. HORTON. On page 17 you state:

At this time, the greatest danger to the Robinson-Patman Act, therefore, resides in agency inaction.

Namely, that would be lack of enforcement, and you have also made the categorical statement that this was one of the reasons why the small businessman is in a problem today. What is being done to remedy that situation? In other words, you have made the strong point that the Robinson-Patman Act is protection for the small businessman and you made the point also that lack of enforcement or agency inaction has resulted in not being able to furnish the tools or techniques necessary to help the small businessman.

What is going to happen now? Are you going to increase your agency action or are you going to continue to reside in this same situation?

Commissioner MACINTYRE. I have hopes it will be increased. I do not control that situation, but my voice and my vote will be lent in that direction.

Mr. HORTON. Well, it is your feeling that the agency, by its inaction-

has materially affected the ability of the small businessman to compete in today's market?

Commissioner MACINTYRE. I gave this example from Florida where I think this occurred.

Mr. HORTON. Thank you, Commissioner.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. Thank you, Mr. Chairman.

Commissioner MacIntyre, with reference to the article in the pink sheet which I discussed with Commissioner Jones, as I understand, this was, of course, a consensual statement given not only in his own behalf but for his colleagues as well, and I would like to read to you a brief excerpt.

He said, on page 9:

As the study proceeds we will not be immobilized. We expect there will be no decrease and perhaps even an increase in the proportion of our budget devoted to Robinson-Patman enforcement.

Reading that against the headlines which I think fairly reflect the body of the pink sheet's story, it says:

Moratorium on R-P complaints seen at FTC until end of 1970 or longer while the FTC conducts empirical study.

Could you tell us your understanding of, to me, the rather plain language that the chairman used in behalf of yourself and your colleagues?

Commissioner MACINTYRE. Well, my understanding stems from the very first word you read, that is, that there is no intention of suspending our effort but let the study go forward while we are carrying on the effort.

Mr. POTVIN. Then, Commissioner, going a step deeper into this, examining perhaps the rationale of underlying foundation of the act, there has been a rather concerted effort to somehow give the impression that those who favor Robinson-Patman and its enforcement are perhaps after all good people but remnants of another age, a little stodgy, or a little dusty in their thinking, and as the chairman just noted, perhaps living fossils, that it somehow is not relevant to this space age, to this dynamic, rapidly changing economy.

Would you care to speak to that, sir?

Commissioner MACINTYRE. Well, I must come to the defense of Commissioner Jones. I don't consider that she fits that sort of designation. I think she is young and viable and one of the new age.

Mr. POTVIN. She is both gracious and lovely, you are correct there, sir.

Commissioner MACINTYRE. And you heard her position stated to you this morning on that sort of thing.

I, in further comment, would say this, that my hopes have been raised on this matter by virtue of the fact that this committee is airing these views, its hearings will help put things in their proper perspective, and I think as frequently occurs when that is done, people of good will, good heart, good judgment, will reach the right result, and I have higher hopes now that the Federal Trade Commission will likewise be doing so.

Mr. POTVIN. Well, Commisioner, certainly you are to be highly commended, I speak as a member of the staff of the subcommittee, I am sure the members would hold the same point of view.

Commissioner MACINTYRE. Thank you.

Mr. POTVIN. Thank you, Mr. Chairman.

Mr. DINGELL. Mr. Wertheimer?

Mr. WERTHEIMER. I have no questions, Mr. Chairman.

Mr. DINGELL. Commissioner, the Chair does wish to commend you for a very powerful and very fine statement, and for your very helpful presence and comments this morning.

I just wish to again raise one question already raised by Mr. Potvin, and that is whether or not the Commission does propose a moratorium on enforcement of the Robinson-Patman Act.

Commissioner MACINTYRE. I don't understand it that way. I don't understand that that is the intention of anyone. I trust it will not be found to be the case.

Mr. DINGELL. I would, of course, have to be intensely critical if such were to transpire.

Commissioner MACINTYRE. I certainly am not lending my vote and my voice and my judgment in any effort in that direction. It would be for the enforcement of the law, and the public policy underlying the law.

Mr. DINGELL. Which has clearly been established by Congress and should not be changed by administrative fiat or by the Bureau of the Budget or by anybody else under any set of circumstances.

Commissioner MACINTYRE. I think so, and I don't believe that it is quite fair to Chairman Weinberger to characterize his statement and his stated position as intending to suspend this law, and as I say, my hopes are higher than they have been because of these expressed views of his.

Mr. DINGELL. Well, since you have participated in the consensus which was the creation of the statement, I would have to assume that you had no understanding at all in your discussion or in arriving at the consensus, and I am referring not only to you but also to the other members of the Commission, that there was anything of this kind contemplated by the Chairman's statement, that there would be a moratorium on Robinson-Patman enforcement during the time that the study that we have been discussing is arrived at, am I correct?

Commissioner MACINTYRE. Certainly I heard nothing discussed that would indicate any such idea of suspension.

Mr. DINGELL. As a matter of fact, Mr. Potvin calls my attention to a note which says—we will not be immobilized, quoting page 9 of the Chairman's statement.

Commissioner MACINTYRE. Well, I noted that, when the Commission adopted the statement.

Mr. DINGELL. Commissioner, the committee is deeply appreciative of your presence. We wish to commend you and say that it is always a privilege to have an old friend, and an alumnus of this committee back to appear before us. Your presence is always pleasing and it calls for us to say that we are very fond of you and very proud of you.

Commissioner, we do thank you very much.

(Commissioner MacIntyre's complete statement follows:)

STATEMENT OF EVERETTE MACINTYRE, COMMISSIONER, FEDERAL TRADE COMMISSION

Presently, the assumptions underlying the Act and the Commission's enforcement of this law are both under attack. The issues raised are fundamental to any assessment of antitrust, for price discrimination "frequently determines whether individuals, businesses, and regions will prosper or decay."¹ As a result, public policy in this area is too critical to be resolved solely on the basis of value judgments divorced from empirical data. Nevertheless, this seems to be precisely the direction of the current challenge to enforcement of the price discrimination statute.

Congress in enacting the Robinson-Patman Act "held steadily as its guiding ideal the preservation of opportunity to all usefully employed in the service of distribution" in line with their ability to serve the public with real efficiency as well as the preservation of the public's freedom of choice in buying and selling.² Of late, these objectives have frequently been derided as an anachronism smacking of a more naive era. Nevertheless, the goal of freedom of opportunity for the efficient, including small business, has been frequently restated by Congress. Consider, for example, the Small Business Act.³ Moreover, the Supreme Court has recognized that throughout the history of the antitrust laws "it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."⁴ That objective has been judicially noted in the case of Section 7 of the Clayton Act and the Sherman Act. Significantly, therefore, this is not an antitrust aberration unique to the Robinson-Patman Act as some of its detractors assert. The goal of opportunity for the small as well as the large, moreover, is not an ignoble one. It should not be obscured by over-reliance on economic arguments not solidly grounded in fact and which simply do not take account of the legislative intent underlying the price discrimination statute.

II

Ironically, criticism of the alleged anticompetitive effects of the Robinson-Patman Act seems to be increasing at a time when the Commission's enforcement efforts under the statute have sharply diminished.⁵ Disagreement within the Commission, echoing the attacks on the statute from without, has in recent years precluded aggressive enforcement of the Act. Moreover, it is fair to say that, at present, for an innovative and sympathetic interpretation of the statute

¹ Dirlam and Kahn, "Fair Competition: The Law and Economics of Antitrust Policy", 210 Cornell University Press (1954).

² S. Rep. No. 1502, 74th Cong., 2d Sess. (1936).

³ "It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." 15 U.S.C. § 631 *et seq.*

⁴ *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945); *Brown Shoe Co. v. United States*, 370 U.S. 294, 316 n. 28 (1962).

⁵ As noted by one commentator in comparing the applicable statistics for 1960 and 1965:

"By comparison with 48 price discrimination complaints in fiscal year 1960, the Commission issued just 3 Section 2(a) complaints in fiscal year 1965. Compared with 97 orders in 3 dismissals in fiscal 1961, there were 21 orders and 19 dismissals in fiscal 1965. The Brokerage Clause has simply vanished; the Commission's last 2(c) complaint came out over three years ago." See, Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 A.B.A. Antitrust Sec. 9, 14 (1966).

The following figures for fiscal years 1969 and 1968, indicate that since that comment there has been no upswing in the Commission's enforcement of the Act:

Fiscal year 1969 :	
Complaints	8
Orders to cease and desist	7
Partial orders to cease and desist	2
Order withdrawing complaint	1
Fiscal year 1968 :	
Complaints	7
Orders to cease and desist	9
Order dismissing	1
Order terminating	1

The following figures showing informal settlement of Robinson-Patman Act cases by way of assurances of discontinuance similarly give an enlightening picture of the commission's enforcement efforts under the Act:

Fiscal year 1966	22
Fiscal year 1967	18
Fiscal year 1968	19
Fiscal year 1969	24
Fiscal year 1970 to date)	9

*92

*8 of which are not public.

we must look to the Supreme Court and to the private bar in treble damage actions. Consider, for example, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), and *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969). It is safe to say a majority at the Commission could not have been mustered in recent years for the result reached by the Supreme Court in those cases.

III

The disturbing aspect of much current criticism of the Robinson-Patman Act enforcement is that it is simply devoid of empirical content. The critics quote one another approvingly but fail to articulate the factual basis on which their case rests. For example, how is one to come to grips with an argument relying on sources so inchoate as an "impressive body of literature"?⁶

Characteristic of the current challenge to the Act is the following comment:

"Unhappily, little that the Commission undertakes in the antitrust area can be defended in terms of the objective of maintaining and strengthening a competitive economy. Consider price discrimination. There is now an impressive body of literature arguing the improbability that a profit maximizing seller, even one with monopoly power, would or could use below cost selling to monopolize additional markets. Yet, not only has the Commission continued to bring predatory price discrimination cases, but the alleged danger of predatory pricing remains a principal prop of its vertical and conglomerate antimerger cases. . . ."⁷

Compare that statement's generalizations with the factual situation in *National Dairy Products Corp. v. F.T.C.*, 1969 Trade Cases, ¶ 72,829 (7th Cir. 1969), a Commission primary-line proceeding under Section 2(a) of the Robinson-Patman Act. There the court found that the respondent had engaged in a geographic price discrimination resulting in a loss of \$1,345, 582 in its sales of jams and jellies. According to the court, this loss was, of necessity, subsidized from profits earned by National Dairy in other markets. Further, the court held that as a result there were great and damaging losses to the respondent's independent competitors, none of whom could meet or compete with such a selling program since the price was below the cost of materials alone. As the court noted, the independent competitors injured "are financially unable to compete with such a massive below cost sale."

Clearly, the empirical data refutes the contention that the profit maximizing seller is inherently unlikely to use below-cost sales to monopolize additional markets. Further, the *National Dairy* case documents, contrary to the report's assertion, that predatory pricing is indeed a phenomenon worthy of antitrust consideration. The report fails to make clear why the Act should be condemned on the basis of unsubstantiated generalizations in direct conflict with market facts evidenced in the Commission's records. Criticism of this nature, which ignores the pertinent facts, whether by intent or inadvertence, cannot justify erosion of the price discrimination statute by the failure to challenge law violations when they occur.

The most oft-stated criticism of the Robinson-Patman Act which should be laid to rest is that it leads to price rigidity and that it stifles competition in concentrated markets. Specifically, the argument is made, as in the Neal Report,⁸ that price discrimination stimulates competition in concentrated markets and facilitates entry into oligopolistic industries. The weakness of the argument is that no empirical data has been cited in its support. In fact, available economic data indicates the contrary. There is evidence that in a number of concentrated industries it is the independent, small and medium competitor who affords significant price competition. For example, in certain industries major companies are more inclined to compete on the basis of non-price competition such as product changes and promotional campaigns rather than price reductions to increase sales. It is the smaller competitor in such industries who has neither the security nor the investment of his large rivals who will characteristically use price more willingly and flexibly to attract customers for his products when demand is slack and to increase prices when demand is strong. Such firms are evidently more responsive to the laws of supply and demand. Accordingly to one comment, these competitors

⁶ Report of the Task Force on Productivity and Competition, 413 BNA ATRR, X-3 (Stigler Report), June 10, 1969.

⁷ *Ibid.*

⁸ "White House Task Force Report on Antitrust Policy", 411 BNA ATRR (1969).

play a role entirely disproportionate to their size in keeping the market flexible and dynamic.⁹

The Commission's primary-line price-discrimination case relating to the roofing industry, *Lloyd A. Fry Roofing Co. v. F.T.C.*, 371 F. 2d 277 (7th Cir. 1966), also demonstrated the importance of independents for maintaining price competition in a concentrated industry. In that proceeding, the Commission made a finding affirmed by the court, that the major competitors, including Fry, had followed a system of price leadership leading to price uniformity. The challenged price discriminations, according to the finding, were instituted for the express purpose of discouraging lower prices by respondent's smaller rivals. As a practical matter, the predatory discrimination in *Fry* may be viewed as a policing mechanism in a price-fixing arrangement. In the beer industry, the hearing examiner's initial decision in *Anheuser-Busch*¹⁰ indicates that the discriminatory price cuts were initiated by Anheuser for the purpose of disciplining smaller competitors when they failed to raise prices in response to increased costs due to a labor contract. He further found the price discrimination in question ended because the regional competitors of the large national seller, who initiated the price discrimination, had learned their lesson. Thereafter, they promptly followed Anheuser's subsequent price rises, being careful to keep the price differences between them and the respondent at an amount which would not bring retaliation.

In short, the Commission's evidentiary records indicate that selected price cuts in concentrated markets by dominant sellers are more apt to be utilized for disciplining competition and to lead to price rigidity rather than flexible and dynamic pricing as critics such as the authors of the Neal Report contend. The Robinson-Patman Act has a vital role to play in preserving price competition in concentrated industries where otherwise disciplinary price cuts might lead to rigid pricing conformity by all participants in the market.

Enforcement of the Robinson-Patman Act has also become confused as a result of a dispute between proponents of an antitrust approach looking to market structure alone and those who would concentrate solely on anticompetitive conduct. The advocates of either extreme have missed the mark. Any antitrust assessment with pretensions to validity requires a determination of why this is so.

A number of critics such as the authors of the Neal Report call, in the name of competition, for revision of the Robinson-Patman Act drastically reducing its scope, while at the same time advocating a direct attack on concentration in industry, by a number of means including apparently dissolution suits. It is ironic that the advocates of a direct attack on concentration should at the same time urge abandonment of the challenge to price discrimination. In this connection, I would like to associate myself with the statement on February 6, of Professor Robert C. Brooks, Jr., before your subcommittee that predation and exclusion have had a substantial and direct impact on industry structure.¹¹ The rationale behind a policy advocating industrial deconcentration while adopting a permissive posture to practices directly responsible for such concentration is inexplicable. It simply does not make sense to confine antitrust enforcement to combatting undesirable market structure alone while permitting those practices which generate such concentration to go scot free.

Moreover, as a practical matter such proposals are a call for non-enforcement of antitrust. The approach envisioned under the Neal Report's "Concentrated Industries Act" involving in all likelihood large scale dissolution is unlikely to receive Congressional sanction. Thus, the Neal Report, if its recommendations on price discrimination are followed would inhibit challenges of anticompetitive behavior, but nevertheless would be unlikely to generate a serious challenge to economic concentration.

My views as to the practical consequences of a course ignoring anticompetitive conduct and focusing on structure alone are to a considerable degree derived from the Commission's experience with the dairy industry. Beginning in the mid-fifties, the Commission issued a substantial number of complaints to bring to a halt a wave of mergers in the dairy industry. By and large these proceedings were brought to a successful conclusion. Most national major dairy firms

⁹ Statement of Dr. Alfred E. Kahn, Professor of Economics, Cornell University, *Hearings on Economic Concentration Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess., Part 2, 597 (1965).

¹⁰ *Anheuser-Busch, Inc.*, 54 F.T.C. 277, 292 (1957), *rev'd*, 265 F.2d 677 (7th Cir. 1959), *rev'd*, 363 U.S. 536 (1969).

¹¹ Statement, Professor Robert C. Brooks, Jr., Vanderbilt University, Before the Select Committee on Small Business, Subcommittee on Small Business and the Robinson-Patman Act, February 6, 1970.

are under **Commission order prohibiting future acquisitions of their competitors.** The merger wave in this industry has been halted, but nevertheless concentration increases. With the passage of time, it became evident that small and not so small dairies were disappearing not through merger but simply because the competitive climate was no longer viable. Many of these firms were up to date sizable competitors, but were unable to continue not because of inefficiency but rather because of their financial disadvantage, vis-a-vis, multi-market conglomerate firms.

The Commission is frequently besieged with pleas from independent dairymen requesting that they be permitted to sell their business to large national firms under Commission order before their assets are further wasted by unfair methods of competition. The erosion of the Robinson-Patman Act has contributed positively to increasing concentration among dairy firms. On the basis of my experience, this segment of the economy is a classic example of an industry where an approach devoted to structure alone, while glossing over anticompetitive behavior such as price discrimination, has, of necessity, been self-defeating.

As noted some ten years ago before your Committee:

"[I]f these large firms are prohibited from using mergers in their . . . growth, they may still reduce competition and tend toward monopoly if they are permitted to use discriminatory practices against their smaller competitors. In fact, it is the opinion of some industry spokesmen that prohibiting mergers alone will not prevent a tendency toward monopoly because often it is cheaper to destroy a small rival than to buy it."¹²

That analysis is still valid today.

In implementing the national policy, relying on competition to regulate and improve the performance of markets, the enforcement of the Robinson-Patman Act and Section 7 of the Clayton Act should be regarded as complementary. Similarly should the Robinson-Patman Act be repealed or rendered nugatory by ineffective enforcement, Sherman Act proceedings could not fill the gap. The price discrimination statute which deals with restraints of trade in the seed rather than the weed, is a prophylactic statute. The Sherman Act comes into play when the damage has been done. Congress with good reason therefore determined in 1914 and again in 1936 "that the Sherman Act alone was inadequate to accomplish its purpose."¹³ It is far more difficult to restore competition once crippled or destroyed than to maintain it in an already viable climate. To maintain competition in being is of course the primary function of the Robinson-Patman Act.

Since it is not practical under the antitrust laws to restructure the entire economy to make it perfectly competitive, enforcement of the price discrimination act must receive continuing attention. Unless the Commission clearly evidences its intent to prevent such anticompetitive behavior, a climate will be created where even those concerns which can compete on the basis of efficiency will lose the incentive to do so because they do not have the capital resources to combat price discrimination by firms with superior financial resources. The Robinson-Patman Act has a vital role to play in furthering competition in those instances where inequality of capital rather than economies of production and distribution appear decisive in the rivalry for trade.

Up to this point, I have addressed myself primarily to the price discrimination provisions of Section 2(a) of the statute. Sections 2(d), 2(e) and 2(c), relating, respectively, to payments for advertising or promotional services, the furnishing of services, and brokerage payments, of course, also have a significant role to play in the statutory scheme. Nevertheless, current suggestions delineating criteria for Commission enforcement of these provisions would essentially negate the Congressional intent behind their enactment. For example, the A.B.A. Commission to Study the Federal Trade Commission, relying on a "large and growing body of uniformly critical opinion", questioned, without supporting documentation, enforcement of the "*per se* and quasi *per se* rules" embodied in Sections 2(c), 2(d) and 2(e). The A.B.A.'s solution would require the Commission to

¹² Testimony of Willard F. Mueller, formerly Director, Bureau of Economics, Federal Trade Commission then Professor, Department of Agricultural Economics, University of Wisconsin, *Hearings Before the Special House Subcommittee of the Select Committee on Small Business, Small Business Problems in the Dairy Industry*, 86th Cong., 2d Sess. 770 (1960).

¹³ H.R. Rep. No. 2287, 74th Cong., 2nd Sess. (1936).

confine its enforcement of these provisions "to cases in which injury to competition exists".¹⁴

The difficulty with this approach lies in the fact that it contravenes directly the statutory text and Supreme Court interpretation of the provisions in question. In enacting Sections 2(c), 2(d) and 2(e), Congress intended that practices within their scope should be the subject of an absolute prohibition to prevent evasion of Section 2(a) by hidden price discriminations. The reason for incorporating an absolute prohibition in the so-called *per se* or quasi *per se* sections of the Act are, of course, perfectly rational. The object was to force price discriminations into the open where they would be more readily detected and where it would be easier to make accurate comparisons with alleged cost savings.¹⁵

Clearly, the prohibitions in question do have a sound legislative basis. In any event, it is not the Commission's function to question the economic wisdom of Congress in framing the statute.¹⁶ To make a finding of injury to competition, a condition precedent to bringing an action to enforce Sections 2(c), 2(d) and 2(e), would clearly derange the statutory scheme enacted by Congress. The Commission, of course, must have an order of priorities in determining which cases should be brought. This may be determined on the basis of factors such as importance of the industry involved or substantiality of the practice under consideration. However, turning the question of whether to proceed on the basis of a criterion specifically rejected by Congress would amount to a *de facto* revision of the law by an administrative agency without benefit of statute. Such a course would not be consistent with the Commission's function as an arm of the Congress.

The current debate over the Robinson-Patman Act generated by criticism implicitly advocating administrative erosion is crucial for a number of reasons. It involves, over and above the substantive issues, the role of this agency in relation to Congress. For practical reasons, the Federal Trade Commission has a great deal of discretion in determining the focus of its law enforcement efforts under the Robinson-Patman Act, as well as the other statutes which it administers. The Commission simply does not have the resources to pursue violations across-the-board in the case of these statutes, desirable as this might be. As a result, it must pick and choose among conflicting claims for its attention. In the guise of reordering priorities, a process of necessity governed by the value judgments of individual Commissioners, the agency may lose sight of the Congressional intent. At this time, the greatest danger to the Robinson-Patman Act, therefore, resides in agency inaction. When the Commission decides to close a case there is no appeal and very little publicity. As a result, it is difficult for the outsider to determine the direction of Commission enforcement under the statute. The Robinson-Patman Act has a vital role to play in antitrust enforcement. Legislative oversight by committees such as yours and visible Congressional support are therefore critically needed if the statute is to fulfill the legislative intent. Responsible Government demands that whatever statutory revision is desirable should result from Congressional action rather than administrative default.

Mr DINGELL. If there is no further business to come before the committee, the committee will stand adjourned until 10 o'clock tomorrow morning, March 4, 1970.

(Thereupon, at 11:50 a.m., March 3, 1970, the subcommittee stood in recess until 10 o'clock the following morning, March 4.)

¹⁴ Report of the A.B.A. Commission to Study the Federal Trade Commission, pp. 67, 68 (1969). The Neal and Stigler Reports go further, recommending outright repeal of these Sections.

¹⁵ See *Simplicity Pattern Co., Inc. v. F.T.C.*, 360 U.S. 55, 68 (1959). In addition, the brokerage section was designed to prevent double dealing on the part of brokers where such an intermediary ostensibly receives payment from a buyer or seller but actually is in the employ of the other party. Such a conflict of interest was deemed inherently unfair and injurious to the seller or buyer not adequately represented. See Patman, "Complete Guide to the Robinson-Patman Act", 105, Prentice-Hall Inc. (1963).

¹⁶ *Simplicity Pattern Co., Inc. v. F.T.C.*, *supra*.

SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

WEDNESDAY, MARCH 4, 1970

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359 Rayburn House Office Building, Hon. William L. Hungate presiding.

Present: Representatives Hungate and Horton.

Also present: Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. HUNGATE. The committee will be in order.

We will begin the hearing. I would first like to express Mr. Dingell's regrets. He is in another committee hearing at this time. You may have noticed some of these committees are working on the railroad this morning, and he is unavoidably detained there. And Mr. Horton has also advised he will be here as his schedule permits.

We are pleased to have Commissioner Philip Elman with us this morning. And if you will, proceed with your statement.

TESTIMONY OF PHILIP ELMAN, COMMISSIONER, FEDERAL TRADE COMMISSION

Commissioner ELMAN. Thank you very much, Mr. Chairman. I appreciate very much the opportunity to appear here this morning and to participate in these important hearings. I have a prepared statement, but I do not intend to follow the text of it verbatim, Mr. Chairman. I shall make some changes as I go along.

Congressional oversight of the manner in which Federal agencies exercise delegated statutory responsibilities is an essential part of the legislative process. It is also an essential part of the administrative process. For that reason, as a member of the Federal Trade Commission, the agency charged with primary responsibility for enforcing the price discrimination law, I especially welcome this committee's review of Robinson-Patman Act enforcement. Our common goal is to enlarge and to improve the Commission's effectiveness in enforcing the act in the public interest, and I am confident that the large amount of time and effort which the committee has expended, which has been expended by others in this process of review, will prove to be well spent, will prove to yield substantial benefits to the public in terms of better results and more productive law enforcement.

Now, as you know, this committee's review of Robinson-Patman Act enforcement coincides in time with the Federal Trade Commis-

sion's own internal review of its performance in discharging the various and many important functions which it has been given by the Congress. Calls for improvement in the efficiency and effectiveness of the Commission, for its revitalization, to use President Nixon's word, have come not only from Members of the Congress, the public, the bar, and other groups, but from the President. The Commission, under the leadership of Chairman Weinberger, is responding to these calls. And I am confident that the Commission has a bright future, and that it will indeed emerge as a truly revitalized and dynamic force in American society, fulfilling the large role which the great progenitors of the Commission, Woodrow Wilson and Louis D. Brandeis, envisaged. For this reason, I think it is more useful, more constructive to dwell, not on the failures and the shortcomings, real and alleged, of the Commission's past performance, but rather on its future. I would rather look forward than backward. I think we should concentrate on what the Commission can and should do in order to discharge more effectively in the future the duties which have been conferred upon it by Congress. And among the principal and most important of these duties, of course, is enforcement of the Robinson-Patman Act.

I concur fully in the statement which was submitted last week to the committee by Chairman Weinberger on behalf of the entire Commission. That was a unanimous statement. As that statement made clear, there is no disagreement whatsoever among the Commissioners, and there never has been, as to the common ground on which we all stand—the soundness and the relevance today of the basic policy and purposes of the Robinson-Patman Act. Although the business and market conditions of 1936, particularly the methods of distribution have changed dramatically in many industries, the basic underlying policy of the law has not become outmoded or irrelevant to the economy of the 1970's and beyond.

I reject the argument which has been made by some that the Robinson-Patman Act is incompatible with the essential goals of our national antitrust policy and other antitrust laws. As I stated 4 years ago, in a Law Review article appearing in volume 42, Washington Law Review, on the Robinson-Patman Act and antitrust policy:

Despite the criticisms that have been made of the Robinson-Patman Act and its administration, there should be none as to the validity of the underlying premise on which Congress acted in passing the law. The act expressed a basic consensus that business rivalry in a free economy should not be unfair and destructive of the competitive process. It was premised, in part at least, on a recognition that there will always be large buyers who may attempt to abuse their power to the detriment not only of their smaller and weaker rivals but of the process of competition.

* * * The "guiding ideal" of Congress in passing the law was "the preservation of equality of opportunity as far as possible to all who are usefully employed in the service of distribution and production." As the Supreme Court stated in the *Sun Oil* case, "Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned." * * * The "competition" sought to be limited is unfair rivalry among unequals, a type of conduct that may lead to monopoly. Thus, the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals.

Now, that is the end of the quotation from the article in the Washington Law Review in 1966.

This basic design of the Robinson-Patman Act is an essential part of national antitrust policy. In enacting statutes such as the Robinson-Patman Act and the Small Business Act, Congress has sought to vindicate two fundamental and complementary—not inconsistent, but complementary—concerns: Fairness in competition, and preservation of small business. Congress has been aware of the dangers, social and political as well as economic, of an economy dominated by a few industrial giants in which decisionmaking is left to remote, faceless managers. The Robinson-Patman Act was thus a recognition by the Congress that competition may be lessened and small business may be destroyed by unfair and unjustified price discriminations and related practices.

Now, a second common ground on which all members of the Federal Trade Commission stand is that the price discrimination law should not be relegated to a secondary or minor role in the Commission's activities or be allowed to become antitrust's stepchild. The Commission must continue in the future, as it has in the past, and I emphasize as it has in the past, because there has been a misconception even among such knowledgeable members of the bar as Mr. Robert Wald as to how much of our expenditures, how much of our resources, has been allocated to Robinson-Patman enforcement. I think former Chairman Dixon will be able to enlighten you in greater detail when he appears here later this morning, but I would say roughly, as a general estimate, we have spent in the past 8 or 9 years about one-sixth of our budget on Robinson-Patman enforcement. The general division is between restraint of trade and deceptive practices activities, right down the middle, and in the restraint of trade area, there has been a general three-way, almost equal, division among mergers, Robinson-Patman, and general trade practices. So we have not subordinated Robinson-Patman as far as expenditure of money is concerned. There have been as many attorneys, as much money, as much in the way of supporting assistance, accountants, economists, devoted to Robinson-Patman as to enforcement of the merger law.

Now, as I say, the Commission must continue in the future, as it has in the past, to allocate a substantial portion of its resources to Robinson-Patman enforcement. In this program, as in others, the Commission must utilize all of the various powers, remedies, and procedures available to it. We are an administrative agency. We have been given by the Congress many powers, many functions, that enable us to deal in a flexible way with a situation that comes before us, picking the one which, in the particular circumstances, will yield the greatest benefit to the public interest. Now, in some areas, a broad industry-wide approach, for example, by promulgating general rules or guides, is appropriate. Utilization of the industrywide approach has proven useful in the past, and I have urged expansion, intensification of the Commission's rulemaking work, generally, across the board, and also in Robinson-Patman, as set forth in detail in the separate opinion which I wrote in the *Callaway Mills* case. There are many areas in which such a rulemaking approach offers greater promise than a case-by-case approach. Industrywide rules or guides may be useful, especially useful, in those situations where we have industrywide pricing practices where there is a 2(b) meeting-competition defense that is

offered, if you proceed against individual respondents, and that complicates enforcement where you follow the case-by-case approach.

Now it was not by inadvertence that Congress created the Federal Trade Commission at the same time it enacted the original Clayton Act in 1914, outlawing anticompetitive price discriminations. The enforcement of the price discrimination law, in my opinion, is ideally suited to an expert administrative agency—a body like the Federal Trade Commission, with the power to bring to bear to such problems the specialized knowledge, expertise, continuity of experience, and flexible procedures and remedies which are the hallmark of the administrative process. If the Commission fails to utilize its administrative powers wisely in enforcing the act, or any of its provisions, that would defeat the purposes of Congress. When the Commission is presented with evidence that a particular company has violated one of the statutes it administers, the Commission does not automatically, mechanically, willy-nilly, issue a complaint against that company, simply on the basis of a presentation by the staff that there is evidence to believe that that particular company has violated the law. The Commission has to consider and weigh all the factors bearing on how best to enforce the law. Is this a general problem, is this a problem where an industrywide approach would be more productive and at less expense? Would we be getting more for our enforcement dollars if we used the industry approach or an informal enforcement approach rather than a complaint? If the complaint route is indicated, if in the situation we feel that the complaint route is the most effective one, should action be taken against this particular respondent alone? Is he the only one that is engaged in the illegal practice? Are there others? Should we proceed against him and them, should we proceed against all of them, or should we proceed against only some of them? In which order shall we issue the complaints? All of these factors bear on prosecutorial discretion, they bear on enforcement policy, they bear on a judgment of what action will be best in the public interest.

Now, we ask also the question, would informal enforcement procedures, for example, the taking of assurances of voluntary compliance, suffice to bring about full compliance with the law?

Now let me give a few examples which illustrate how the Commission has fashioned and exercised enforcement policy in dealing with Robinson-Patman Act matters. And I would stress that the examples I give, and I could give many others, are examples where the Commission has been unanimous, where the Commission has recognized that the judgment whether to proceed in a particular way, by complaint, or guides, or whatnot, that the judgment is very different from the judgment of how you might decide the case if you were to issue a complaint and it should later come before the Commission on a record with evidence. These are two types of questions, two types of judgment, one of enforcement policy, the other on the merits. And the Commission unanimously over the years has routinely taken assurances of voluntary compliance in Robinson-Patman matters. We have decided that we will sue A, we will not sue B. We have decided that we will issue guides, or that we won't sue anybody. We have made that enforcement judgment under 2(d), under 2(e), we have made it across the board, we have made it with respect to the merger law, we do it in

deceptive practices, and I emphasize to you, this is unanimous, this is the way the Commission has approached it and I don't think there is any other way it could approach these problems.

Mr. HUNGATE. Pardon me. Counsel?

Mr. POTVIN. Commissioner, you have talked of voluntary compliance and you have used the phrase "industrywide rules." Could you embroider that a bit? And specifically, are you talking about trade regulation rules?

Commissioner ELMAN. Both. I am sorry, you didn't finish your sentence.

Mr. POTVIN. I was going to say, could you give us your position on what you feel is the promise or potential of trade regulation rules, in a restraint of trade rather than a deceptive practice sense?

Commissioner ELMAN. Well, generally speaking, I don't see too much difference between rulemaking in the one area rather than the other, or in particular subdivisions of these areas. To me the rulemaking power is the sleeping giant of the administrative process. The Commission has recommended to the Congress this year that any doubts be removed as to our authority to issue substantive rules having the force of law, and there are very serious doubts about that authority which are entertained by respected members of the bar and others—we have asked the Congress to remove those doubts and give us the authority under the Federal Trade Commission Act to issue substantive rules, just as we have that authority under the Labeling Acts, and the Flammable Fabrics Act, and the Truth in—well, not the Truth-in-Lending Act, but the Truth-in-Labeling Act. And I am all in favor of rulemaking when we are dealing with an industrywide problem. I am all in favor of a provision that says that when the Commission issues a rule dealing with an industrywide problem, anybody who violates that rule should be subject to immediate penalties, right off the bat, not merely after a cease and desist order. I am against this one-free-bite-at-the-apple approach that the Commission has had to follow in the past.

I think a good deal of our ineffectiveness, not only in the Robinson-Patman area, but in the consumer protection area, and elsewhere, is due to these intrinsic structural factors in the scheme of enforcement. So I would say generally I am in favor of rulemaking, but I don't think that you can just decide specific problems that come up on the basis of "well, I'm for rulemaking, or I'm for issuing a complaint." I think you have to make an ad hoc judgment in each situation. Which will be more productive, which will give you the best results more quickly and more fairly? And so I would say that while the Commission ought to be given enlarged rulemaking power, we ought to exercise it more than we have. But we will still not be relieved of the obligation and responsibility of making a judgment of enforcement policy in each situation.

Mr. HUNGATE. Please continue.

Commissioner ELMAN. Now these examples I want to give from the past years are familiar to the committee, but I think it would be well to recall them now.

In dockets 7717 and 7721, the Commission dismissed 2(d) complaints—you are all aware that 2(d) is a per se statute and doesn't

require any evidence of lessening of competition and so on—the Commission dismissed 2(d) complaints against Max Factor and Shulton, stating that “in the exercise of its administrative responsibility to determine what enforcement policy, in the circumstances, is ‘best calculated to achieve the ends contemplated by Congress’”—and that quotation is from the Supreme Court’s decision in the *Moog* case—“[the Commission] has decided to dismiss the complaints in the present cases,” against the suppliers. The Commission pointed out that “The respondents are only two among the very large number of suppliers who participated in Weingarten’s special promotional events during the period in question. The entry of cease-and-desist orders against these particular respondents therefore, would not be an equitable and fully effective method of eliminating the discriminatory practices in which respondents engaged, along with many others, and would not be in the public interest.”

Now, one of the Commissioners did not concur in the result, but he stated that he agreed that an appropriate proceeding under section 5 against the buyer was a better means for challenging the practices involved. So there was unanimity on the basic proposition that the Commission should make a judgment of enforcement policy, even in a 2(d) situation, as to whether the source of the evil was a large, powerful buyer who was putting pressure on all his suppliers who were the innocent victims, and that it was not desirable or effective to bring a whole host of cases against them, racking up, you know, a large and impressive statistic about the number of complaints, but that it would be more effective to proceed against the large buyer.

Now, dismissal of these actions against two of many sellers was clearly consistent with the intent of the Robinson-Patman Act to frustrate unfair conduct by large buyers.

Now, another example, another instance in which the Commission utilized administrative discretion was its decision to issue Fred Meyer guides, following the Supreme Court’s decision, rather than to issue a flood of 2(d) complaints against companies not acting in conformity with the decision. Now, the Commission could have issued complaints, the Commission could have tested the scope of the *Fred Meyer* decision by issuance of a whole host of complaints, and if we were interested in playing the numbers game, that would have been a very nice way of playing it. But the Commission, instead, unanimously, without exception, said no; we are not going to issue complaints under 2(d), we are not going to get orders under 2(d), that’s not the way to enforce the law. We are going to give people affected by this decision guides as to how they can comply with the law. We are going to issue detailed guides.

Now, as it happened, I didn’t agree with all the guidance the Commission gave, and in one important respect I thought the guidance was mistaken. But I certainly didn’t disagree that the way to handle this problem was through guides, and I concurred in most of the guides and, as a matter of fact, the guides that were ultimately issued reflected to a very considerable extent, as the public record shows, proposals that I had made for amending them.

Now, as I say, the Commission clearly could have issued hundreds of complaints against companies whose practices under *Fred Meyer*

were violations of 2(d), a per se statute. The Commission's action of issuing guides instead was clearly the more sensible approach, was a more efficient approach, was a more effective approach, and was not inconsistent, again, with the purposes and provisions of the Robinson-Patman Act.

Finally, I would note the Commission's action concerning alleged 2(c) violations in the fresh fruits and vegetables industry. I emphasize I am not talking about the merits in any way, and I don't bring this up in any way bearing on the merits. I am talking now about enforcement policy and how you go about carrying out a policy which you formulate. The Commission initially determined that issuance of trade practice rules, rather than complaints, was the most appropriate means of dealing with apparent violations of the Robinson-Patman Act found in that industry. Subsequently, the Commission's staff recommended issuance of complaints against the growers, who were paying this allegedly illegal brokerage. Now, if there were violations of 2(c), they were guilty of violations of 2(c). The staff recommended issuance of complaints against them. The Commission, in a judgment of enforcement policy, under 2(c), a per se statute, said, "No, we are not going to issue complaints against the growers. We are going to proceed against the others." And it took some time to conduct an investigation, as you all know. "We are going to go not against the growers," the Commission considering them the innocent victims, "but against those responsible for granting the allegedly illegal payments, the buyers."

Now, as I say, I am not going to go into the merits of that, the merits of the decision to issue a complaint. All I am saying is that is an illustration of how the whole Commission is dealing with a per se statute like 2(c), will still exercise administrative discretion, will exercise a judgment of what is the best enforcement policy.

Now, the Commission necessarily is engaged continuously in the exercise of administrative discretion as to the statutes it enforces. As the examples noted above illustrate, the fact that certain statutes set forth per se violations does not mean that these statutes are not subject to the wise exercise of enforcement policy and judgement.

Now, I would like to interpolate at this point, this is nothing new, this is a policy that has been followed not only by the Commission but by the staff. I think if you will ask Mr. Francis Mayer, who is the chief of the Robinson-Patman staff, "Do you take into consideration in recommending to the Commission that it issue a complaint under 2(c), 2(d), or 2(e), do you take into consideration the competitive significance of the alleged practices," the answer would be, "Yes." He does it, he should do it.

Mr. HUNGATE. Pardon me. May counsel inquire?

Commissioner ELMAN. And of course I emphasize that there is a very big difference between the question, is there in the case proof in a technical way of a substantial lessening of competition, the kind of evidence you would need in a 2(a) complaint. That is not necessary in a 2(c) case, for any purposes. I am talking rather about general competitive significance.

Mr. HUNGATE. Pardon me just a moment. Does counsel have a question there?

Mr. POTVIN. Yes, Mr. Chairman.

Commissioner, this, of course, is one of the matters that has been booted about a great deal in the record of these hearings. As you unquestionably recall, in order to fill in a lacuna in the ABA report, which strangely said nothing about procedures, we asked spokesmen for the administrative law section of ABA to appear and testify. Two very distinguished members of the bar, as you noted, Mr. Wald and his colleague on the board of that section, Mr. Cornelius Kennedy appeared. Mr. Kennedy made the point that an administrative agency is, of course, tripartite in nature, one of their functions being that of the legislative sort of thing, as an arm of Congress, but that in the case of a per se statute you have the anomaly of it arriving in your hands with the legislative aspect of your authority already fully exhausted. Would you concur with that? Hopefully, I have implicitly made the distinction between the priority and the resource judgments that, of course, must be made, and the purely legislative function. But confining it to just that, would—

Commissioner ELMAN. Let me understand. What do you mean by the purely legislative function?

Mr. POTVIN. Well, I think that in many areas you have, as an example, extensive power to make rules. This is one of the customary ways of passing statutes. The Congress would rather pinpoint the problem and use a very broad approach and mandate an agency to go forth and write rules and enforce them. Not so with a per se statute.

Commissioner ELMAN. Oh, certainly not.

Let me say that in the guise of developing an enforcement policy, the Commission certainly cannot change the law. It can't change the law as it is written, as it has been enforced. It can't change the requirements of proof. The per se rule is a rule of evidence. As to what you have to prove, it simplifies enormously the trial of these cases, and it is a very useful rule. And the one thing that is absolutely clear is that when you are dealing with a per se kind of offense, whether it is under the Sherman Act, or whether it is under these subsections of section 2, you don't want to import, it would be a very dangerous thing to import, into the trial of these cases any requirement of proof beyond what Congress has provided and what the courts have established. I am with you 100 percent on that.

Mr. POTVIN. There is here, of course, a very delicate area in which it is most difficult to make judgments, one would think, as you have pointed out and as others have pointed out, there of course must be made what are really, I suppose, managerial decisions. You are sitting down there with just five of you, a relatively tiny staff viewed against the background of our economy and our population in this Nation.

Commissioner ELMAN. Could I interrupt at this point to say, while we are sitting there with only five of us, we do not have a tiny staff. I don't consider 30 lawyers and all the supporting personnel a tiny staff. But I think you will find from your examination of the minutes of the Commission going back to, what is it, January 1, 1961? You have got them all. You will find in the overwhelming majority of cases the Commission has supported the staff recommendation, whether it was for closing, whether it was for complaint, whether it was for issuing rules or guides, the Commission has supported the staff, and

there has been unanimity. You will find, for example, when you look at my voting record, that my voting record is practically indistinguishable from Rand Dixon's in Robinson-Patman Act matters. And so far as closing of cases is concerned, I was interested, I didn't know of these numbers until I saw them in memos—you will find that in the 1333 investigations that were closed since January 1961, Chairman Dixon voted to close 1,175, I voted to close 1,168. Commissioner MacIntyre voted to close 1,125. Now, his number was a little smaller than ours, but he came to the Commission 6 months after we did, so that accounts for the difference.

Mr. POTVIN. To return to this. You, of course, have this managerial function and, as you pointed out, there are some terribly complex, sophisticated judgments that need to be made.

Commissioner ELMAN. Yes.

Mr. POTVIN. However, if as part of that complex of judgment making you insert an additional factor of damage to competition, injury to competition in a broad, substantial kind of way, doesn't that go beyond the managerial function, doesn't that really get into some sort of an administrative judgment?

Commissioner ELMAN. I emphasize we should not get into the technical question of whether in this particular case there has been a substantial lessening of competition, therefore we should issue a complaint. That is an irrelevant question. But, given the Commission's limited resources, which everybody recognizes, we start with the proposition that the Commission can't sue everybody. The Commission doesn't have enough people, doesn't have enough money, can't conceivably bring cases against everybody. And even if it could, there would be a question about whether that would be the most effective way to enforce the law. But in any event, we start with the proposition you can't sue everybody. And you do have to make choices, managerial choices or whatever. Now here you are, you are Mr. Frank Mayer, you are the chief of the R-P staff of the Commission, you get—

Mr. POTVIN. My regard for Mr. Mayer is such that I regard that as quite flattering. Thank you.

Commissioner ELMAN. I put this example in his terms because I think what he is doing is right, and my respect for him is as large as yours, Mr. Potvin.

Now, these cases come across your desk every day in the week, year in and year out, and you have to make a judgment which case you are going to recommend for complaint and which you are not. Now, here are two cases, let us say. Both of them are per se cases. Both of them are cases which, if you bring, you don't have to worry about showing substantial lessening of competition because you don't have to. You can bring one of these two cases. Now, the premise is you can't bring all these cases. Now, let us say you have to make a choice between those two cases, as to which one you will issue a complaint in and which one you will take an assurance of voluntary compliance. You take into consideration the competitive impact of the practices in case 1 as against case 2. Of course you do. Mr. Mayer does it all the time. He does it every day in the week, and I think he is to be commended for it. He makes that judgment. It is a relevant judgment. And I think if he didn't make that judgment he ought to be fired.

Mr. POTVIN. Are you saying, Commissioner—well, let us start at the top here. There is, of course, an anomaly, I suppose, in giving an administrative agency a per se statute in light of the fact that you are not in the same business as, say, the Justice Department.

Commissioner ELMAN. I am not so sure I would use your word "anomalous." I have written on the subject of how an administrative agency can best perform its functions, and whether per se statute enforcement is best left to a prosecutorial agency like Justice, and so on. There is a general philosophical—

Mr. POTVIN. It presents some conceptual difficulties.

Commissioner ELMAN. Yes, sir; conceptual problems. And I have tried to wrestle with them in various things I have written on the subject.

Mr. POTVIN. Now, let us say—I note that a spokesman for the service station operators in this area is in the room. Let us say that he comes in with one of his service station operators and they have a perfectly documented case over which reasonable men could not differ, there has been a violation of one of these per se sections. Now, you make the point that, necessarily, you need to use discretion and judgment and a myriad of decisional factors in deciding whether a complaint will issue. Let us assume that your decision and that of your colleagues is that a complaint will not issue. What other rights would the complainant have?

Commissioner ELMAN. Well, add to your question, why did we make that decision?

Mr. POTVIN. Let us say you decided that because of the relatively limited resources, that there was another industry which loomed more importantly in your combined judgment at the moment and you were already committed to leap there and you didn't think you could do both.

Commissioner ELMAN. Let me say, first of all, that in the 9 years I have been on the Commission I don't remember turning down a recommendation for a complaint on that basis.

In any case where the staff has come to us and recommended that we issue a complaint against a particular respondent, the Commission has looked to the staff memo to see whether there is sufficient evidence of violation of law, almost routinely we have issued the complaint. We haven't said, "well, we ought not to issue this complaint because we don't have the manpower." If the staff recommends a complaint, they have got the manpower ready to try the case. So you are really putting to me a very unreal hypothetical case.

Mr. POTVIN. Well, Commissioner, I am really trying to approach this from the perspective of the individual small businessman rather than from the internal view you would have down there at the Commission.

Commissioner ELMAN. Well, I think there has been a lot of misconception about how the Commission actually operates.

Mr. POTVIN. Well, let me ask you, you start with this situation. You have a statute which says it is a violation if you do thus and so.

Commissioner ELMAN. Yes.

Mr. POTVIN. Somebody comes into the building down there with highly documented proof that someone has indeed done thus and so to

them, and it is a violation. Now, if you start without going into it—

Commissioner ELMAN. You ought to have a darn good reason for not doing something to help that man.

Mr. POTVIN. So that you would feel that they would have a right, since he is a citizen and the law says that this is a violation, and it is your duty to enforce the law, you should do something to help him.

Commissioner ELMAN. Right.

Mr. POTVIN. Well, what would those possibilities include?

Commissioner ELMAN. Those possibilities would include every type of remedial action open to the Commission within the statutory powers and resources Congress has given it, which I hope the Congress will enlarge.

Mr. POTVIN. And that is really the stream that flows against this need for management that you have depicted.

Commissioner ELMAN. Well, you know, I would hope that for the future, and I have been talking more about the future in this prepared statement and answering questions about the past, I would hope that for the future we wouldn't turn away people on the ground that we don't have the resources. I would hope that the Commission would be able to improve its managerial capability to the point where we would get more work out of our lawyers in terms of cases, in terms of complaints issued, in terms of cease and desist orders issued, in terms of litigated cases. For 9 years at the Commission I have been dissatisfied with the amount of work we have done in this field and in other fields, and I have made no secret of it. I would have liked to have seen more complaints coming out of the Robinson-Patman area, not fewer. Everybody that is familiar with the Commission from the inside knows that to be so. And I would hope that we wouldn't turn people away when they come to us with documented evidence of violations of the law.

I would hope that we could avoid all these, you know, nice academic weighing of, well, shall we proceed against another industry as against this industry. It seems to me if there is a violation of law and somebody comes in complaining about it, you ought to have a darn good reason for telling him "No, we 'ain't gonna do nothin'."

Mr. POTVIN. That is a very reassuring answer, Commissioner. Thank you.

Commissioner ELMAN. Now let me go back to this point because I understand there have been a lot of questions on it, this point about the managerial prosecutorial judgment as to whether you always sue somebody when there is a per se violation of the law, whether once there is a showing of a per se violation you have got to issue a complaint.

Now this problem came up before this committee, not too long ago, in a different context, and it involved price fixing, which is about as per se as you can get. Back in 1963 the report of this committee, following hearings concerning an FTC advisory opinion on joint price ads by druggists, cited, with approval, the following testimony of Mr. Henry Bison, general counsel for the National Association of Retail Grocers, to the committee. And I would like to read what Mr. Bison said to this committee, which this committee endorsed in its report and recommended to the Federal Trade Commission that it follow. This is what Mr. Bison said, and I think that

it was as well put as it could be put. Another one of my heroes in addition to Frank Mayer is Henry Bison, and I have told him that I was going to infringe on his copyright and read this testimony again:

First of all, we don't understand the per se doctrine as some kind of immutable rule that requires the antitrust agencies to act without discretion in slaying the innocent with the guilty, the weak with the strong, the just with the unjust so that no one can be spared.

The purpose and the end of antitrust laws are to preserve competition. Are we to understand that the per se rule requires the antitrust enforcement agency to prosecute blindly without regard to the nature and character of the trade practice involved, that they must close their eyes to the circumstances of the parties involved, or to the effects on the market and other factors, and that they must follow a policy of prosecution for prosecution's sake, even to the extent that the aim and the intent of the antitrust laws are completely distorted?

We don't think the per se rule has ruled out of antitrust enforcement policy sound judgment and commonsense reasoning in applying the antitrust laws, and neither has it ruled out the cardinal rule that the facts and the circumstances of each case must govern the application of the law.

The committee report stated, and I quote from the report of this committee:

It is obvious that the law requires the Commission to find that it "would be to the interest of the public" before proceeding against these small business concerns. The Commission must not abdicate its "public interest" jurisdiction by improper use of the per se rule.

The Congress established the Commission to aid and promote competition, not suppress it. * * *

Now, I don't think any of us can disagree with that.

Mr. HUNGATE. Mr. Commissioner, let's assume, conceive that we have a per se violation.

Commissioner ELMAN. Yes.

Mr. HUNGATE. And suppose you are quoting Mr. Bison there, the argument that there shall be no bloodletting on the streets of Bologna and the surgeon bled somebody to heal him. We shouldn't prosecute the surgeon. Is that the general philosophy that you are indicating?

Commissioner ELMAN. I think he expressed a general philosophy of government and law enforcement which is applied by Federal, State, local law enforcement officials right across the board.

Mr. HUNGATE. That there should be some measure—

Commissioner ELMAN. Commonsense and judgment.

Mr. HUNGATE (continuing). Discretion, as I say, even though the law states this shall be it, that sometimes it requires a measure of discretion.

Commissioner ELMAN. That is right.

Mr. HUNGATE. Would you not agree at the same time, when we have a per se violation, and we then agree that, to the extent that we permit nonprosecution or discretionary prosecution of those cases, we are certainly to that extent substituting the rule of man for the rule of law?

Commissioner ELMAN. I think that is exactly what this committee in its report recommended.

Mr. HUNGATE. And wouldn't you think insofar as possible we would like to apply a rule of law rather than a rule of men?

Commissioner ELMAN. Absolutely. And so far as possible you ought

to establish standards of enforcement policy and make them public so that people know what standards you are following. You ought to adhere to them. This shouldn't be done arbitrarily or capriciously. You want a rule of law, but part of the rule of law is not only the enactment of the law by the legislature, but the enforcement of the law by the executive. And the enforcement of the law by the executive traditionally, from the beginning of time, has included this element of judgment as to what cases to bring. Now, that element of judgment is particularly large where Congress has created an administrative agency to enforce the law. Mr. Potvin used the word "anomalous," and correct me if I am wrong, but I think what he had in mind was this, was the idea of a *per se* rule being subject to this large element of administrative enforcement discretion which Congress has given an agency like ours. Congress has given us the power to deal with *per se* violations under 2(d), for example, by issuance of rules and by guides not having the force of law.

Now, it may be anomalous, but I don't see how, given the tasks that the Commission has been made responsible for, given all of those tasks, I don't see how we could do anything other than try to make these judgments of discretionary policy as sensibly as Mr. Bison has pointed out, using as much commonsense and judgment as we can.

Now, there have been disagreements among us in particular cases as to what commonsense and good judgment would lead to. We have a five-man Commission, and each one of us exercises his own independent judgment, neither one of us is a rubberstamp for the other. And so we have had disagreements. Some of our disagreements have been rather well publicized. What I want to emphasize is that the process by which we function, the process of trying to choose procedures and actions and remedies which will best achieve the statutory goals, is a process which I think has been followed many years and to which we all adhere.

Now, given the Commission's necessarily limited enforcement resources, it must and does take into account, as I pointed out, the competitive significance of allegedly unlawful practices in determining which is the best manner for dealing with them. Of course, the members of the Commission do not always agree as to how administrative discretion can best be exercised. It is hardly surprising that the Robinson-Patman Act, which deals with such real, but difficult and elusive, concepts as "lessening of competition" and "meeting competition in good faith," has created differences in textual interpretation, and differences as to the best means of meeting its objectives not only among the members of the Federal Trade Commission but also the appellate courts and the antitrust bar.

Notwithstanding these differences, I strongly favor intensified case activity by the Commission in the Robinson-Patman area. And if I were going to make a prediction, I would predict that in the next 3 years we will probably issue more complaints and more cease and desist orders than we have in the last 8 years.

Mr. POTVIN. Mr. Chairman.

Mr. HUNGATE. Yes, Counsel.

Mr. POTVIN. At this point, Commissioner, we are discussing this

particular question with each member of the Commission as they appear.

Commissioner ELMAN. Yes.

Mr. POTVIN. Here is what happened. Your new Chairman came up and, in what seemed to me just terribly explicit language, said that while you were going to do a study you are not going to stand still during the study, you are going to do at least as much or hopefully more on Robinson-Patman.

Commissioner ELMAN. Hopefully much more.

Mr. POTVIN. Yes, hopefully much more, correct.

Commissioner ELMAN. I don't think there is any question about what he said and what he meant, and he spoke for all of us.

Mr. POTVIN. Yes, it was a consensual statement, thus it appears appropriate to discuss it with each of you now. Unhappily, the "Pink Sheet" saw a latent ambiguity or perhaps chose to interpret, they will have to say for themselves, that your new Chairman had said there would be a delay. The headline is "Moratorium on R-P Complaints."

Now, could you tell the committee your conception of that consensual statement, and whether there was any hidden moratorium contained, as the "Pink Sheet" claims?

Commissioner ELMAN. Mr. Potvin, I am not one of the faithful readers of the "Pink Sheet." I heard about this in a commission meeting yesterday afternoon for the first time. I haven't actually seen it. One of the reasons I am not a faithful reader of the "Pink Sheet" is that—how shall I put this—that I have not been overly impressed in the past as to its accuracy with respect to FTC matters I knew something about. And I would gather this item is in the same category. As I say, I haven't read that, so I am not going to characterize it. But I will say with respect to the Commission's position expressed to the committee by Chairman Weinberger, there is no doubt and ambiguity about it. It is his hope, as it has been the hope of members of the Commission in the past, that we would beef up our Robinson-Patman Act enforcement. It has been a matter of concern to us, to me, that this statute somehow, to use a phrase earlier in the statement, has become an antitrust stepchild that has been relegated to a sort of inferior position. I think the Commission has to do something, and something drastic, to restore respect in the antitrust bar and the business community for this statute.

And I would hope very much that with a change in administration, and to a very large extent we are dealing now with matters of administration, I would hope that with a change of administration, with the attitude that has been evidenced by the new Chairman with full support of the other members of the Commission, you are not going to see these statistics about one litigated case for 30 lawyers, or 80 percent of the investigations that are opened up, or more, of them closed without any action taken. Those statistics are, to me, most depressing. I would hope that we will get much more work out of that staff, we will get much more—when I say "work" I am not talking about how many hours, I am talking about output in terms of complaints, in terms of enforcement action. I am talking about complaints with effective orders. Nothing has discredited the Commission more, not only in this area but in other areas, than the Commission's putting

out cease and desist orders and tolerating a process of bargaining and negotiating about compliance without getting penalty action. I have written about that publicly. So I think that the President has asked for revitalization of the Federal Trade Commission, he has asked for unity, and he is getting it, at least so far as I can see. And to the extent that I am able to support this within the few months left to me at the Commission, I will do everything I can to work towards those goals.

Now, intensified activity, however, must be more than the playing of a bureaucratic numbers game—it must have substance as well as shadow. Let me interpolate at this time that nothing has bothered me more than to have people come up here, complain about the statistical record of the present Commission, complaining about the Commission's lack of performance, people who proclaim very loudly that they are friends of the statute, friends of the act, and so on, whose own performance when they were in office was to play a numbers game which was impressive on its face, but resulted in a lot of orders that were not enforced. Insofar as anybody knows, we have got darn little empirical evidence on any of this, so far as anybody knows it didn't make a particle of difference.

Now, Mr. Dixon, whom I have criticized openly in many respects, with regard to his administration of the Commission, was at least an honest Chairman of the FTC. He did not want to play the numbers game, and I give him high marks for this. He was interested in results. And whether he achieved results or not is something about which people can disagree, but the record is there, and people who want to make the effort to explore it can find it. You know what the Commission accomplished or didn't accomplish under Mr. Dixon's administration.

And I want to say here, and I want to put it on the record, I think Chairman Dixon is to be commended for giving up that numbers game, and for looking for results. I don't think he achieved the results that he wanted, and there are a lot of reasons for that. But at least he was trying, he was trying to do the right thing, he wasn't just trying to bamboozle anybody with statistics.

Now, the Commission's Robinson-Patman Act cases should be carefully chosen, thoroughly investigated, and well supported by the evidence required to support the issuance of a cease and desist order.

I am frankly disappointed that the Commission has received so little return for the substantial expenditure of resources it has made on Robinson-Patman enforcement in the last decade. The Commission has allocated approximately one-sixth of its total resources to enforcement of the act, and it maintains a large professional staff of attorneys—I believe it is over 30, or has been, there are some vacancies now, as there are, generally, throughout the Commission—who devote full time to Robinson-Patman matters. Yet, approximately 80 percent of the most recent 3,000 Robinson-Patman Act matters investigated by the Commission's staff were closed without any further action being taken. The minutes of the Commission, which are before this committee, reflect that the great majority of these closings were made by a unanimous vote of the Commission in accordance with the recommendation of the Commission's Robinson-Patman staff. It is clear that far too many of the Commission's Robinson-Patman Act investi-

gations have been dead end matters on which too much of our resources were expended without commensurate benefit to the public.

I am very pleased that the Commission is undertaking a thorough study, a study which will give us an empirical basis for making an evaluation of what we have accomplished and what we have not accomplished, and where our enforcement efforts should be directed. We have directed a thorough study of our past efforts in the area of Robinson-Patman enforcement as a basis for determining how we may more effectively achieve the statutory goals. I have long supported and urged such a study. I urged it publicly, in fact, back in 1966. And there are memos which I have written to the Commission which I believe are before you, showing that I privately urged that.

Now, in my view, the Commission needs satisfactory answers to the following questions: What has the Commission accomplished by the flood of consent orders it has obtained against whole industry blocs, such as the several hundred consent orders issued simultaneously against members of the apparel industry in 1962? Have these orders caused a meaningful change in the competitive performance of the industry or resulted in strengthening the smaller businesses in those industries?

Now, I saw before I got here the statement which Chairman Dixon is to make here, and he points out properly that many of the criticisms of the act or its administration are founded not on empirical data but rather on conjecture, opinion, supposition. And I think that is right. But I would also point out that we don't have empirical data. We, too, have to rely on conjecture, opinion, and supposition in evaluating what our own orders have accomplished, or what our assurances of voluntary compliance have accomplished, or what these closings of investigations have accomplished. We are just talking on a very speculative basis. We just don't one way or the other, and it is about time we found out.

Mr. HUNGATE. Yes, Counsel.

Mr. POTVIN. Commissioner, of course as Fred Rowe and other writers have characterized one of the, again, anomalies of the Robinson-Patman Act is that it is directed against sellers but really the ultimate target are the large buyers.

Commissioner ELMAN. Not always.

Mr. POTVIN. Not always.

Commissioner ELMAN. No. You get a primary line injury case, and you are talking of one seller trying to drive another seller out of business.

Mr. POTVIN. Yes. But in the garden variety secondary injury, a 2(a) case.

Commissioner ELMAN. Yes, particularly the 2(d) *Weingarten*-type case.

Mr. POTVIN. Yes. With respect to the apparel industry, what was your position on that, sir?

Commissioner ELMAN. Well, my position, which was also the position of Commissioner Higginbotham, was that we ought to direct our enforcement efforts against the large buyers to induce these allegedly discriminatory promotional—

Mr. POTVIN. So that you felt—

Commissioner ELMAN. We said so. If you don't have these public

statements, there were dissenting statements by Commissioner Higginbotham and me, and if you don't have any of that material, I would be glad to give it to you because, as far as I am concerned, anything I have ever done or said within the Commission, and outside of the Commission, is available to you, every vote I have cast, the record is there and I think it speaks for itself.

Mr. POTVIN. And the rationale of your position was, as I recall, that the conduct sought to be stopped was really that of the large buyer, so why not proceed directly against them as it would be more meaningful.

Commissioner ELMAN. Well, that is the way it appeared. Of course nobody knew, because these cases weren't tried, they are consent orders and so on. I might mention in this connection that the *Maze Factor* and *Shulton* case, previously cited, goes into -in which, incidentally, I wrote the opinion for the Commission, and there was no disagreement as to the enforcement policy on that- goes into this question of when you go against the buyer, when you go against the seller, and so on, and I thought at the time it was a sound enforcement policy. I don't know. Unfortunately, even though this was written in 1964, we have had practically no cases against buyers since then.

Mr. POTVIN. I was going, Commissioner, next to ask you to distinguish your position in the apparel industry which we have, and all of these documents will eventually be part of the appendix to the record.

Commissioner ELMAN. Yes, I hope you make everything part of the record that the Commission furnished you.

Mr. POTVIN. Yes, sir, entirely.

Commissioner ELMAN. I think it would be very useful and educational.

Mr. POTVIN. And I think certainly a great boon to the antitrust bar.

Commissioner ELMAN. As well as students of the administrative process.

Mr. POTVIN. Yes, sir. Very true.

I was going to ask you to distinguish, if you would, sir, your position in the apparel industry from your position in the AMC matter which, of course, was a large buyer.

Commissioner ELMAN. The AMC matter never reached the Commission for a decision on the record.

Mr. POTVIN. That is true, sir.

Commissioner ELMAN. And my position on the AMC matter was I was in favor of the consent orders that were offered by the respondents. I thought that those orders were a useful and beneficial means of dealing with the problems that were raised, or at least with the violations that were alleged in the complaint. And it seems to me as a matter of hindsight that the Commission would have been well advised to have taken these orders rather than, as it eventually did, throw the whole case out, throwing away hundreds of thousands of dollars, and God knows how many man-hours. I think Commissioner Nicholson gathered the information as to what expenditure of resources was made in that case and it was all down the drain. The taxpayers didn't get one penny's worth of benefit out of it. It was very unfortunate.

Mr. POTVIN. Let's see. In the Commission minutes there was much

discussion on all of these points, it is terribly voluminous. Had you taken a position concerning the possible issuance of a complaint?

Commissioner ELMAN. Are you talking now about the original issuance of a complaint against AMC?

Mr. POTVIN. Yes, sir.

Commissioner ELMAN. I think I had some problems, as I recall, with that complaint. I think I had some problems with the scope of the proposed orders. I would like to review my records on it.

Mr. POTVIN. Certainly. It was voluminous.

Commissioner ELMAN. If the minutes don't show the reasons for my vote, I will be glad to furnish them to you. Although it is going to be very hard to reconstruct, if I have to go back into 1964, I don't know when that complaint was issued, and start reconstructing reasons why you voted as you did. All I can say is, at the time it came up we had staff recommendations, we had staff memos. It is my practice in all matters, and I am sure it was followed in that matter, to study these, and if the recommendation of the staff appeared to be well founded, to support it. If I had some problem with it, I would raise it at the Commission table, or circulate a memo on it, and the matter would eventually be put to a vote. There are literally, I don't know, hundreds of complaint actions which the Commission took in the past 8 or 9 years. And I think that the number of instances in which I did not support the staff recommendations or in which I voted not to issue the complaint where the majority voted to issue the complaint, was very limited, it was a very small number.

And I am sure that the AMC case was given careful consideration at the precomplaint stage, as it was in the later stages, and if I voted as I did I must have had a good reason for it at the time.

(The information referred to follows:)

APRIL 1, 1964.

The Commission

Philip Elman

Associated Merchandising Corporation, et al. File No. 601 0059.

I am not convinced that this complaint should issue at any time, but I am quite sure that it should not issue now.

The staff itself indicates some uncertainty about the strength of its case: it raises, but does not answer, the serious questions outlined in Commissioner Reilly's memorandum. Moreover, the staff does not even mention what must be a grave problem here: the burden, under *Automatic Canteen*, of coming forward with evidence of AMC's knowledge that the preferential prices which it received were not justifiable. At the least, this matter should be returned to the staff for further consideration.

Most important, I believe that no purpose would be served by our issuing this complaint now. Our recent decision in *Joseph A. Kaplan*, Docket 7813, has put AMC's suppliers on notice that preferential prices to AMC are illegal. This alone should, as a practical matter, stop the practices challenged by this complaint. The Supreme Court has endorsed such preventive use of 2(f): "for § 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer." *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73 (1953).

I move that this matter be returned to the staff to be held until after our order in *Kaplan*, if sustained, becomes final. If our order in *Kaplan* is not sustained, the staff should re-submit this case to us. However, if our order in *Kaplan* is upheld and becomes final, then three months thereafter the staff should investigate and report to the Commission whether AMC is buying at preferential prices from the six suppliers listed on pages 6 to 7 of the staff memorandum or otherwise violating 2(f).

Mr. WERTHEIMER. Mr. Chairman.

Mr. HUNGATE. Yes.

Mr. WERTHEIMER. In the same area, you talked about the question of FTC cases being brought against large buyers. It is your feeling, isn't it, that not much action had taken place in this area?

Commissioner ELMAN. Yes. There have been very few—AMC is one case. Another case is the *Suburban Propane* case, which was a 2(f) case, which, unfortunately, also has gone down the drain, that case has ended. The cases which the Commission in the *Max Factor* and *Shulton* opinion directed its staff to bring, you know, were cases against, say, department store buyers, putting pressure on suppliers in connection with promotional events and so on. There are investigations going on but very little has come to the Commission level.

Mr. WERTHEIMER. Do you consider this is a basic weakness in terms of the Robinson-Patman enforcement?

Commissioner ELMAN. I think it is a basic shortcoming in the Commission's past activities in Robinson-Patman enforcement which I hope will be remedied in the future. I don't think there is any shortcoming in the statute. I think that almost all the problems that we have had are problems that could have been dealt with, from my standpoint, better administration.

Mr. WERTHEIMER. You are aware of the criticisms that have been raised along the lines that while the act was basically designed to deal with the problems of large buyers, in too many instances enforcement has not been directed against large buyers but rather against small firms.

Commissioner ELMAN. Yes; I am aware of that criticism and I think it is justified on the basis of lack of action.

Mr. WERTHEIMER. Thank you.

Mr. HUNGATE. Mr. Oden.

Mr. ODEN. Commissioner, while we are on the point of issuance of complaints, during the hearing a question has come up, a point has come up about the Commission's practice of issuing dissenting opinions to the issuance of complaints. I wonder whether you could direct some comments toward what you feel is the propriety of doing so, the utility and the reason behind a Commission member issuing a dissent when the Commission issues a complaint.

Commissioner ELMAN. You say the practice, which implies it is done very often. I would say again, there have been hundreds and hundreds of complaint actions the Commission has taken generally across the board, since I joined the Commission. And there have been relatively few cases in which there have been private dissents from the issuance of complaints. Most of our actions, as you can see from your records are unanimous.

So, to put it in perspective, there have been very few negative votes on the issuance of complaints. Now, of the cases in which there have been negative votes privately, at the Commission table, on the issuance of complaints, only an extremely small, tiny percentage of those have there been dissents from the issuance of the complaint made public. And if there is a culprit here, it is I, because I have done so, but I would say I don't think I have publicly dissented from the issuance of a complaint in more than what, four or five cases, something like that, over a period of 9 years. It is hardly a practice.

MR. ODEN. I didn't mean to refer to it as a practice. That was a bad choice of words on my part.

Commissioner ELMAN. It is a very exceptional, unusual action which I would hope that in the few months I have left on the Commission I will not have to take again. But when I did it I thought it was justified and in the public interest because—let me enlarge on this—the issuance of a complaint is very different from a decision as to whether there is a violation of law that you make on the record after a case is tried before an examiner and it comes back to you on appeal. This is a decision that you make as to how best to enforce the law, whether to issue a complaint against A, or to issue it against B; whether you are going to proceed one route or another route, and so on. You are talking now about managerial, prosecutorial discretion; all those things.

Now, the Commission makes that decision, and there is a negative vote on it. The negative vote may be based on those considerations, or it may be based on the feeling that the complaint is not properly drawn, or that the theory of the case is wrong, or that there may be a violation but they haven't spelled it out right, or else that the order proposed is not adequate. A negative vote can be based on all of these considerations or any of them. Now, when you publicly dissent from the issuance of a complaint, as I have, you are not telegraphing that you are going to vote against a cease and desist order if on the record the evidence of violation of law is shown. You are not making any judgment whatsoever as to what is going to be in the record or what judgment you are going to draw from that record on the basis of the evidence.

Now, on whether it is a wise thing and, as I say, it is a most unusual, exceptional action to publicize it, I am a great believer in the Freedom of Information Act, and the philosophy underlying it. I believe in an open Government, I think the public ought to know what Government agencies are up to. When the Federal Trade Commission issues a complaint, that is a matter of public interest. We said so in the *Cinderella* case where we went to the court of appeals and told them we were justified in issuing press releases on the issuance of a complaint where the respondent said that was a form of prejudgment. We said no, people are entitled to know when we issue a complaint. Well, it seemed to me that on some rare and unusual occasions where we issued a complaint, the public was entitled to know, the respondent was entitled to know that I didn't think it was a wise and sensible and appropriate thing for the Commission to do.

Now, as I say, I have done this in a few cases. I don't apologize for them. I think what I did at the time was right and justified by the particular circumstances. And if anybody believes that my publicly dissenting from the issuance of a complaint means that I will not exercise a full and unbiased and objective judgment on the record of the case when it comes before me in my judicial capacity, they just don't know me.

MR. HUNTRIDDER. Pardon me just a moment. Yes, Counsel.

MR. ODEN. Commissioner, that is not exactly what I was trying to get to. I am sure respondent's counsel and respondent and the staff realize that when the case is appealed to the Commission it will be examined on its facts. The fact is that once the Commission in the

issuance of a complaint files a dissenting opinion, even a rarity, say two or three times in a 10-year period, the first thing is the psychological implication it has with the Commission staff itself, to the hearing examiner, to the respondent himself, and it seems like this is one guaranteed way of the Commission getting an automatic appeal from the hearing examiner's decision, even though the respondent's counsel might know that you are going to review an occasional fact from the hearing examiner's opinion, they still have that feeling, well one Commissioner for sure felt so strongly against the issuance of a complaint that he publicly acknowledged his feeling, and where, in the administrative process, where an agency issues a complaint, it is issued in the name of the agency and—

Commissioner ELMAN. Well, I think you are wrong on several counts. First of all, there is no necessary implication, when you publicly dissent from the issuance of a complaint, that you feel so strongly about the merits of the case or lack of merits. There is no implication that you think it is a weak case.

Secondly—

Mr. HUNGATE. Pardon me. Right there, let me try to understand this better. Can you give us a concrete example, the facts of what happened in this situation, why you would privately dissent or publicly dissent.

Commissioner ELMAN. Let me give you two examples. One was a case involving S. & H. trading stamps, where I publicly dissented from the issuance of a complaint, right on it. I didn't write any opinion, I just dissented. And that case was—my reason for dissent was I thought that the way to deal with the trading stamp problem was really legislative or rulemaking. I thought it was a basic general pervasive problem and I didn't think that just suing one company on the theory on which that company was being sued, getting a cease-and-desist order against that one company, was wise law enforcement. I voted against the complaint.

The case was tried before a hearing examiner; a record was made, it was appealed to the Commission. The Commission entered findings of violation of law and a cease-and-desist order. I concurred. I joined in that. I didn't dissent from that, but I felt it necessary to state at that point why I had dissented earlier and why I was concurring in the order. That was one example.

The other example is a matter which is currently in adjudication, and it is these brokerage cases in the lettuce industry in California, where I wrote a rather strong dissent from the issuance of a complaint. Now, there I relied on what I would call, generally speaking, public interest considerations.

Mr. HUNGATE. I don't think the purpose of the committee is intending to seek to influence or invade the province of the Commission. I want you to be fully aware of that. And your statement is simply what you care to make on that.

Commissioner ELMAN. Yes.

Mr. HUNGATE. And I say at the same time in a case in which you entered a ruling and have not set forth your reasons, I am not thoroughly satisfied whether we are entitled to pry into your mind, and have no objective to do so. But in cases, of course, where you have made a public statement of it or care to, we would like to hear it.

Commissioner ELMAN. I am reluctant to talk about a pending case, but there are so few instances where—offhand I don't recall another one where I wrote a dissenting statement of that length.

Mr. HUNGATE. You have written a dissenting statement which is a matter of public record; is that right?

Commissioner ELMAN. I would suggest that you ought to put it in the record at this point rather than to have me paraphrase it. You will find nothing in that dissenting statement on the issuance of the complaint which should lead any reasonable person to have any doubts whatsoever as to my objectivity in dealing with the issues of fact and law on the record of the case when it eventually comes to the Commission for decision.

Mr. ODEN. Well, Commissioner, as your statement says, you are trying to project in the future rather than discuss the past.

Commissioner ELMAN. Yes.

Mr. ODEN. This was my reason for asking that, not any case pending or any complaint that was issued previously, but, to use a well-coined term, snowball effect where one public dissent to a complaint starts, and it becomes easier, in not only the Federal Trade Commission, but in the whole administrative process. I should have couched my question not in terms of the FTC.

Commissioner ELMAN. I agree with you. It would be a very unfortunate thing if you had that become a practice.

You referred to the "Pink Sheet" carrying an article. There was an article the other day in the New York Times, which is on my reading list, there was an article about the Federal Trade Commission last, what was it, Monday—Monday, which quotes me as saying that "you have seen my last dissent." Of course, it expresses more a hope than a prediction, but it does express my basic philosophy about dissent. I am not by nature a dissenter, even though I have written quite a number of dissenting statements in the past few years. Before I came to the Commission I used to argue cases in court, the Supreme Court, and I loved to win cases and win arguments. And when you dissent, Mr. Chairman, you are advertising to the whole world publicly that you have lost your argument, you haven't been able to persuade your fellow Commissioners, and you are a loser. And I didn't like, or relish, the role of a dissenter. I dissented only when I thought it was my duty to dissent, and I dissented in terms that I thought would be clear and understandable to the public and to the bar as to why I was dissenting. But I would hope that, again speaking of the future, that we are entering a period where members of the Commission will stop fighting, privately as well as publicly, and that we will work together and we will enter an era of cooperation rather than confrontation and disputation, and make progress and do a better job of enforcing these laws—one of which is the Robinson-Patman Act.

Mr. HUNGATE. Do you have another?

Mr. ODEN. Yes, Mr. Chairman.

Like I said before, I should have probably couched my question not in terms of the FTC but I am sure—in fact, I know you are aware, it has been raised time and time again about the whole administrative process and the fact that a panel of commissioners not only issue a complaint on what it feels are the merits of the case and all, this is

what I was trying to get to. Not only has that criticism been leveled several times about the quasi-judicial agencies, but also on the issuance of a complaint. I guess it would be a bad day when decisions were decided on issuance of a complaint rather than an appellate process.

Commissioner ELMAN. That is right. You see, I said before that you were wrong on two counts. I didn't get around to the second count, Mr. Oden. This argument can be turned around. You say that if a commissioner dissents from the issuance of the complaint, this makes the complaint counsel feel that he has a harder burden to carry. Well, look at it from the respondent's standpoint. If five commissioners unanimously issue a complaint against his company, after they have examined the evidence, now you can tell the respondent over and over again, play a phonograph record, about how you haven't made any pre-judgment about it and so on, but a respondent's lawyer may feel that after you voted to issue the complaint, that there is a sort of a burden of going forward that has shifted to him. So this thing works both ways.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. Thank you, Mr. Chairman.

First of all, I think it is of central importance at about this point in the record to make one point as loudly and clearly as I can. I certainly hope that none of the questions that have been propounded to you have in any way given you the impression that anyone is attacking either your integrity, your sincerity, your competence. I don't think there is any question but that your record in public life reveals that you are a person of the utmost integrity and sincerity, and you are certainly extraordinarily competent. It would be highly unfortunate if there were any even residual or peripheral ambiguity in this record on that point.

Commissioner ELMAN. Mr. Potvin, it never entered my mind that that was the purpose of these questions. We are here to clear the air, and I think these hearings have served a very useful purpose, and from my own personal standpoint they have given me an opportunity to inform the committee, and through you the public, about how the Commission has actually operated in this area. And mistakes have been made. I contributed my fair share to those mistakes, and I think we ought to see what we all can do together to prevent the recurrence of those mistakes. But attacks on my integrity—it never entered my mind, that anyone would either make such attacks or have any basis for them.

Mr. POTVIN. Commissioner, on this question of dissenting and so forth, one of the things that we continue to hear both from the reports that have been published and from individual witnesses that have appeared and others that were simply interviewed at the staff level, is the lack of morale of the staff. Do you feel that the, well, public disarray, so to speak, we hear used the "air of confrontation" phrase, has added to that, and could you discuss the interplay between the right and need of the public to know and the question of staff morale and a unified, cooperative commission?

Commissioner ELMAN. Yes. Well, I think that, so far as possible, reform of an agency should come from within, that where you are a member of an agency, as I have been these years, your duty where you find the need for reform, where you find the basis for criticism, your

duty is to work from within and try to solve these problems and make these corrective actions from within.

This presupposes an atmosphere in which these reforms can be accomplished. To a very large extent, I think, in my own judgment—others will disagree, I am sure former Chairman Dixon will disagree, as he has a right to disagree, and there is a basis for disagreement—it has been my judgment to a very large extent that the problems of the FTC have been administrative, they have dealt with the selection of cases, the allocation of priorities, a lot of things that the Commission itself as a practical matter could not do. It has had to rely to a very considerable extent on the staff and executive direction, supervisors, and so on.

A point was reached where I found it necessary to vent publicly my dissatisfaction and to express my position on what I felt was an inadequate performance of the Commission, in this area and other areas.

I felt that in order sometimes for other members of the Commission to listen to me, I had to write a forceful dissent. In many instances the dissent which I circulated to the other members of the Commission never came out, because the other members of the Commission and I were able to resolve the differences. Those dissents served a useful purpose even though they never came out.

I sometimes said that some of my best dissents were buried away in the files. One of those dissents was the dissent in the *AMC* case.

Mr. POTVIN. Even some on the surface were not noted for their muted tone, such as Dean Milk.

Commissioner ELMAN. Not at all. I am not noted for my muted tone, Mr. Potvin. As an advocate, before I came to the Commission, I felt that the easiest and most direct way to communicate was in short, simple sentences in which the meaning would not be in any doubt.

Now, I regret as much as anybody that there has been public disagreement. I think it has adversely affected morale. I think there has been a lack of communication to a substantial degree between the members of the Commission and the staff, particularly the younger members of the staff. I think many members of the staff have been unfairly hurt by these blanket criticisms of the staff generally. I think it has been unfair to them because the Commission, like every other institution, like every other agency of Government, has its share of high minded, able, dedicated people. It also has its share of people who stopped doing effective work years ago. And any blanket indictment will hurt the former as well as the latter, and you can't name names, it would be unfair to name names. So this is all very deplorable, and I regret it, but I will say this. Out of this process, out of this process of public criticism of the Commission has come reform, I think if I were to do it all over again there might be some things I would do differently, but I think on the whole it would have done the Commission a disservice, it would have done the public a disservice, it would have done the Congress a disservice for me to have kept quiet about things at the Commission which seemed to me were in need of urgent reform.

Mr. HUNGATE. Mr. Commissioner, we must hope that in at least one decision a large number of its members were not doing their most effective work years ago.

Thank you. Please proceed.

Commissioner ELMAN. If I may just finish this statement. I don't mind any interruptions. The questions are welcome.

The second point as to which I think the proposed study of the Robinson-Patman Act administration should cover is, what has been the extent of compliance with the Commission's Robinson-Patman orders? There have been virtually no civil penalty actions for violation of the Commission's Robinson-Patman 2(a) orders in the entire history of the act. It is, perhaps, worse to issue an order which carries no effective sanctions for violations than to issue no order at all; unenforceable and unenforced orders lead to disrespect of the law and disregard of the law and of the agency issuing such orders.

Third, what can the FTC do to dissipate the widespread view that the Robinson-Patman Act is the "paper tiger" of antitrust laws? As an initial step, would not a few well chosen test cases in varying areas of the economy, under different sections of the statute, be the most appropriate means to achieve this end?

Wise administration of the Robinson-Patman Act, under a clear program of definable goals, will produce a stronger price discrimination law which will play a more meaningful role in antitrust administration and which will have a renewed respect from the business community and the bar. Enforcement policy under the act must be based on business realities, and not on abstract theories. The objectives of the law must always be kept in mind. The Commission should strive to effectuate the basic policies of the act, and it shouldn't be imprisoned by what it regards as a literal interpretation of the statute. Now, for example, in writing my separate dissenting opinion in the *Fred Meyer* case, I was guided by the essential purposes of the act in proposing an expansive definition of "purchaser," as used in section 2(d) of the act, and the Supreme Court eventually held that definition that was proposed by me in my dissent, even though it was opposed by both sides, both the Commission and the respondent opposed it, and was not briefed and argued to the Court, and the Supreme Court reached down and adopted the definition I had urged in my dissent.

Now, if there is any indication or any further indication you need as to my general philosophy as to how the Robinson-Patman Act should be enforced, I think you can look to that.

Now, in sum, I would say that while the Commission's past record in Robinson-Patman matters may not be impressive, better performance by the Commission, with better results in the public interest, is, in my opinion, not a utopian dream but I think a very realistic and reasonable and attainable objective.

Mr. HUNGATE. Commissioner, I certainly thank you for your very conscientious and vigorous statement of your view of the appropriate role of the Commission and the role it could play in the future.

Mr. Wertheimer, do you have any questions?

Mr. WERTHEIMER. Just one. Before that, I would also like to compliment the Commissioner on his very excellent and enlightening statement.

Commissioner ELMAN. Thank you very much.

Mr. WERTHEIMER. In this day and age of the consumer, we have had

people on all sides of the Robinson-Patman Act arguing that their views would in the end produce the best benefits for the consumers of this country. Could you comment on the role of the Robinson-Patman Act and its effect on the consumers?

Commissioner ELMAN. Well, every antitrust law, including the Robinson-Patman Act, when you enforce the antitrust laws you preserve competition. When you protect the economy against monopoly you are favoring the consumer in a very real, meaningful way. The Commission's action in the *Tetracycline* case, for example, which was an antitrust case, was probably the most beneficial proconsumer action the Commission has taken in the years I have been there.

Mr. WERTHEIMER. Thank you, Mr. Chairman.

Mr. HUNGATE. Mr. Oden.

Mr. ODEN. Mr. Commissioner, I only have one last comment. Referring to the dissent and the lively discussion the Commission has had, Commissioner Jones at one time remarked, "Well, we don't want you to accuse us of being a dead agency." And I think it is appropriate to a certain extent.

Commissioner ELMAN. The Commission is very far from dead. I think—from my own standpoint, for whatever it is worth—I think the FTC is the most interesting agency in Washington. I think it has been given the most challenging job. I think if you are a member of the Commission or have been for the last few years, you will find it has been a very frustrating job. There is so much you could do and you fall so far short of accomplishing what you would like to do. But dead? Why, that is absurd. The Commission is far from dead. And whatever life the Commission has had it seems to me will be enlarged in the next few years. That is my hope.

Mr. HUNGATE. Commissioner, could you give us one example from a concluded matter of a situation where there would be a per se violation—we have discussed this before—but where you would not deem it wise to institute prosecution under the act?

Commissioner ELMAN. Well, in the price-fixing field, for example, it is almost inconceivable that you would not bring a case. I mean, the situation which this committee dealt with back in 1963 was a rare one. I would say generally when dealing with Sherman Act per se violation, you almost automatically issue a complaint, or if you are over at the Department of Justice you bring a case if you have got the manpower and resources to bring it. If you don't have the people to do it, you don't do it. But assuming you have got the capacity to do it, it seems to me, Congress has made a judgment. Congress has determined that where you have got that kind of violation there is injury to the public, and your prosecutorial judgment in that kind of situation is relatively rare.

Now, in the Robinson-Patman per se situation, it isn't as simple as that, because you have got problems of whether you want to proceed against sellers, against buyers, the problem whether you want to proceed against particular sellers or others. I think Mr. Gercke mentioned here the other day that the Commission made a number of mistakes by going against No. 5 and getting an order against him which turned out to be worthless because he would have a built-in meeting-competition defense against one, two, three, and four. In that

kind of situation you do have to make a judgment even on per se, who you sue, what will be the value of the order if you get it, how much compliance will you get? These are sometimes relatively simple judgments to make, sometimes they are rather difficult. But there is no way of avoiding them.

Mr. HUNGATE. Not feasible or practical or permissible, or whatever, to bring against both the buyer and the seller or all buyers and sellers involved. That would not be a feasible solution?

Commissioner ELMAN. Sometimes it is, depending on the size of the industry. Now, I think if you have an industry where you have several thousand suppliers and, so far as you know, they are all in the same situation, each one is subject to the same kind of buyer pressure, and so on, and if each one is going to have a meeting-competition defense, you just can't hope to put everybody there under an order and delude yourself that that is going to accomplish anything. I think there may be some situations where you have industrywide practices, where the rulemaking approach can knock out the basis of a meeting-competition defense. Now I just don't know. It is speculative because it hasn't been tried.

Mr. HUNGATE. What I am seeking to get would be some factual example of an industry or something and a practice and a case where you would think that the prosecution of some of them would not be justified even though there were a per se violation. I understand your theory, I think. I will give you an example from my experience, of the statutory rape situation, a boy 17 and a girl 16, and the minimum is 2 to life. And so it changes into assault. That is discretionary.

Commissioner ELMAN. Mr. Chairman, you will find many examples particularly in the 2(d) area, in the material that has been submitted to you, where the Commission has closed 2(d) cases which were per se, where there hasn't been any question about the sufficiency of the evidence to show the violation. You will find that the reasons for closing range widely. We accept an informal assurance of compliance if that will stop it and you don't have to issue a complaint. We are also proceeding by guides, we are putting out advisory opinions. There is a whole gamut of remedies. And you will find all of that spelled out in the material the Commission has submitted to you.

Mr. HUNGATE. Thank you very much, Mr. Commissioner. If there are no further questions, why, you may be excused.

Commissioner ELMAN. Thank you. I appreciate very much your courtesy.

Mr. HUNGATE. Mr. Dixon, please.

TESTIMONY OF PAUL RAND DIXON, COMMISSIONER, FEDERAL TRADE COMMISSION; ACCOMPANIED BY SAMUEL E. COMBS, CHIEF LEGAL ASSISTANT

Mr. HUNGATE. Mr. Commissioner, we are very pleased to have you with us, and we look forward to hearing from you. Proceed as you wish.

Commissioner DIXON. Mr. Chairman, I am glad finally to arrive here. It has been a long time.

I want to introduce my chief legal assistant, Mr. Samuel E. Combs. Mr. HUNGATE. Glad to have you, Mr. Combs.

How do you spell your last name, Mr. Combs?

Mr. COMBS. C-o-m-b-s.

Mr. HUNGATE. All right.

Commissioner DIXON. I have a statement which I prefer to read, and I shall take liberty as I go along, and you feel free to take liberties with me.

Mr. HUNGATE. Thank you.

Commissioner DIXON. I welcome the opportunity to discuss the Robinson-Patman Act, as I have been involved in its interpretation and enforcement for many years.

It is not my purpose to deliver an apology for the Robinson-Patman Act, like so many people do. The underlying purpose of the act is as sound today as it was 34 years ago when it was enacted into law.

Criticism is not new to the Robinson-Patman Act. Most of the present-day criticisms merely echo those objections voiced continually by certain groups both before and since its enactment. Indeed, practically all of their objections were raised in the original congressional debates.

I would like to begin by making reference to something I said in a couple of speeches, and oddly enough, they were several years apart, but it is before the same association, the National Food Brokers.

In December 1966, among other things, I said this:

Unless one is looking for a place to hide, it is not now difficult to know what the Robinson-Patman Act says and means. Today the difficulty with those who say they have trouble with the statute is not, it seems to me, that they do not know what it means, but rather that they do not want it to mean what it says.

The statute says in effect that the discriminations with which it deals violate the concept of freedom which is inherent in both our competitive economic system and our democratic political system. It says further that despite this, some of these discriminations are, nevertheless, not prohibited unless their threat of injury to competition specifically appears to be probable, and unless they cannot be justified by bringing them within the scope of certain provisos....

I also said this with respect to the critics of the act:

. . . I say this because the critics' arrows are again being aimed at both the Commission and the Act, as has been done almost perennially during the thirty-year history of the law. Neither the character of the arrows nor of the bowmen have changed much over the years, but the critics have developed a high degree of resistance to logical reply, largely because they seem to have a philosophical bias that may indicate that they are having difficulty in coming to terms with twentieth century America. . . .

Now, in December 1969, before the same association, I had occasion to refer to more recent criticism which only served to confirm my previous description of the critics of the Robinson-Patman Act. I said this:

I am sure you have had called to your attention the Task Force Report on Antitrust Policy to President Johnson, chaired by Dean Phil C. Neal of the University of Chicago, and the Task Force Report on Productivity and Competition to President Nixon, whose Chairman was Professor George J. Stigler, Professor of Economics at The University of Chicago. Both of these reports were critical of the Robinson-Patman Act as was the ABA Commission Study Report.

In testimony before the congressional committee—and it was this committee here, if you will recall the quotation—

Mr. Miles W. Kirkpatrick and Professor Robert Pitofsky, when directed to that part of the ABA Report which referred to a suggestion that a study should

be made in depth of the Robinson-Patman Act and that pending such a study "the Federal Trade Commission should direct its enforcement proceedings under Section 2 (c), (d) or (e) of the Act to cases in which injury to competition exists," explained under questioning that this was an enforcement guideline to the Federal Trade Commission.

Although many of you businessmen—

and these were a large number of businessmen, I was told there were several thousand—

are not lawyers, I assume you know enough about the Robinson-Patman Act to know that Sections 2 (c), (d) and (e) are per se law violations and were so intended by Congress. This is strange advice from the ABA Commission and would envisage an even stranger way for Commissioners of the Federal Trade Commission to act, since they are sworn to enforce the law.

I am sure you have noticed, as I have, that while the Neal and Stigler reports, and the special study of the American Bar Association are replete with criticism and suggestions, they are devoid of specific facts upon which their conclusions might be based. Their criticisms are founded not on empirical data, but rather, on conjecture, opinion, and supposition. Rather than answering now the unsupported charges against the Commission, let me do something different. Let me, instead, do something that the critics failed to do, let me tell you what we have done.

I have been listening to all that is going on up here and the way people say it, and you can really do anything with figures, statistics, but this committee has got to remember something. In March 1961, when I was approved by the Senate to become Commissioner and become Chairman, the President had announced that he had selected me to be Chairman. I talked about things, based on my experience, that I thought that the Commission ought to do. And I believe I first talked about these things at my confirmation hearings. But I knew full well that no Chairman, however clever he might be, was going to get away with any policy change at the Commission unless he had two other votes, because it is, as intended, an independent agency and policy is set by a vote of the majority.

And when I went to the Commission and expressed my wishes as to the things that I thought should be changed, the other members were helpful and made suggestions, and out of that came a complete change of direction of the Federal Trade Commission. For every year of its prior existence, the Federal Trade Commission had been an agency that, in my opinion, had largely followed what I described as the squirrel gun approach, one can at a time, one at a time.

Now it was a safe approach, as it has proven out in the last year or so, safe in this respect, you could always say, "We are better than we were last year because last year we had so many investigations and we filed so many complaints and we got so many orders."

As I listened to Commissioner Elman say, and I agree with it, you should know where you are going and your objectives when you start, at least have some purpose.

Well, the Commission did not do away with its litigating arm, but rather we turned primarily toward an attempt to do something about the thousands upon thousands of complaints and inquiries that were coming to the Commission. I think we realized then, and I think any future Commissioner or Commission as it will be made up is going

to realize, that in order to handle the broad flow of complaints to the agency, the agency of necessity is going to have to take some kind of an approach whether they wish to call it a voluntary approach or whatever they want to call it. I chose to originally designate that a voluntary approach be attempted, with full faith and credit with the vast majority of American businessmen, to get a practice that was complained of and that we had reason to believe was violating the law, stopped, to get it stopped whether it came by an affidavit or letter of promise, but to get it stopped. That is just as effective as a cease and desist order.

Now, the American Bar Association critics criticized that, as did the young students that call themselves the Nader's Raiders. They said that this was no good unless you had a sanction that you could enforce, meaning a cease and desist order, which, if it is violated, will result in a penalty.

Well, I don't buy that. If you have something stopped and if you have it stopped without a long litigation, expensive usually to the businessmen and to the Government, the objective has been accomplished.

We also turned at that time to a program that offered, where it was practical, binding advisory opinions.

Now, if nothing had happened at the Federal Trade Commission in the last 9 years other than this one thing, this would have been a remarkable change. Where practical, the Commission now renders advisory opinions and they are binding upon the Commission. Unless the Commission changes its mind and gives notice to the party and gives them a chance to change the practice, the Commission will not challenge it.

Now, this seems to be a logical course for Government to follow with the business community if it can. The Government owes that to the business community if it can say to them, "On the facts as you presented them to me, this is all right, or this would be questionable."

We also made great use where we found, as very often you do find in Robinson-Patman enforcement, and in many other trade areas, that circumstances warrant the issuance of what we call guides. They were the old trade practice conference rules. That was a misnomer: it was a guide and never was any more than a guide. And we have held many public hearings, sitting as a body, from which we have issued what I would consider very valuable guides to business.

After Commissioner MacIntyre came to the Commission, we considered and finally adopted a trade regulation rule procedure. This had as an objective a bit of evenhanded law enforcement.

I was just listening to the discussion that was going on here, the difficulty of picking one out of many doing the same thing. How do you start everybody at the same place?

I have never met many American businessmen that fussed when they were fully aware of the fact that they were not being singled out or asked to do anything that others, competitors, were being asked to do at the same time, even though they may disagree with the decision as long as they are not picked out and say, "Why me, just why me?"

So the objective of the trade regulation rule had an evenhanded

type of justice in it. We believe, although we have never had a court test of this, that in the event an individual company or a party that is affected by this rule violates it, we can make great use of the rule-making proceeding by putting the burden on that party to show why he shouldn't have an order. In other words, we perhaps would be able to cut a couple of years out of a tough litigation this way.

We just had our Appropriation Committee hearings in front of the distinguished chairman of this committee, Congressman Evins, and I was trying to make one point. Congressman Evins, on the record, was rather perturbed about the small number of cease-and-desist orders. I was trying to point out to him that there was one chart in our presentation that answered it completely, and he took note of it. There was a chart in our presentation that showed that last year we handled successfully 5,700 troublesome problems voluntarily, and got results.

Now, you can get a result by doing a lot of things, and I think that that is a commendable record, not one that I should be apologetic about.

I want to make one thing clear, and indelibly clear. The Robinson-Patman statute was enacted by Congress upon its determination that such a law was necessary to protect free enterprise and small business. As Commissioners, we cannot avoid our responsibility by questioning the wisdom of the Congress in enacting this statute. We must face our responsibility by acknowledging that we are sworn to enforce the laws charged to us. Now, I, for one, firmly believe in the principles embodied in the Robinson-Patman Act and, as long as I remain a Commissioner, it is my intention to carry out my responsibility.

In 1936, the Federal Trade Commission was charged by Congress with enforcing the Robinson-Patman Act. What prompted Congress to pass such legislation, and to pass it so overwhelmingly? People forget this. There were only 16 votes recorded against the measure in the House and none in the Senate. And it was passed 36 years ago, and not one word has been changed in it although it sure had a lot of potshots taken at it.

What was the purpose of this legislation which Representative Patman was inspired to characterize as the "Golden Rule of Business?"

Mr. HUNGATE. Mr. Commissioner, pardon me. I am going to have to interrupt the hearing here because the House is in session and I have a commitment there at 12:15.

Now, Counsel, what time should we come back this afternoon, 2 o'clock?

The committee will receive recess at this time, to meet again at 2 p.m. And once again, I apologize for interrupting you, but it is absolutely beyond our control. We will certainly appreciate hearing from you at this time. Thank you.

Commissioner DIXON. I understand. I will be here at 2 o'clock.

Mr. HUNGATE. The subcommittee will be in recess.

(Whereupon, at 12:05 p.m., a recess was taken until 2 p.m. the same day.)

AFTERNOON SESSION

Mr. HUNGATE. The committee will be in order.

The Chair will apologize to the witness for being late, and we will proceed to resume the hearing.

Commissioner Dixon, please.

TESTIMONY OF PAUL RAND DIXON, COMMISSIONER, FEDERAL TRADE COMMISSION; ACCCOMPANIED BY SAMUEL E. COMBS, CHIEF LEGAL ASSISTANT—Resumed

Commissioner Dixon. Thank you, Mr. Chairman.

I believe I was on the bottom of page 4 of my prepared statement. A combination of factors and events led to the proposal and subsequent enactment of the Robinson-Patman amendment to section 2 of the Clayton Act.

The twenties and thirties saw a change in the method of distribution in the marketplace. The traditional three-tiered system of distribution—that involving the manufacturer, wholesaler, and retailer—gave way to less orthodox marketing arrangements. The post World War I era saw an integration of these functions. This period was characterized by the rapid growth of grocery chains and mail order merchandisers. Structurally these mass distributors integrated retailing and wholesaling functions within their own organizations. They often eliminated the middleman by dealing directly with the manufacturer.

This rapid growth in the chains was accomplished by an increase in the rate of decline of the independent retailers.

Congress wanted to know what was afoot in the marketplace—and directed the Federal Trade Commission to conduct an investigation into the operation of the chains.

The Commission reported that the powerful chains were recipients of unjustified quantity and functional discounts—not related to any economies of scale—which were not extended to smaller retailers. The Commission foresaw monopolistic conditions if the trend to chain-store merchandising in the field of retail distribution were allowed to continue at the same pace.

The abuses of price discrimination were not new to Congress. There was already legislation on the books expressing congressional concern with the anticompetitive effects of discrimination. In 1914, in the Clayton Act, Congress sought to forbid certain price discriminations. However, due to several apparent weaknesses, the Clayton Act proved ineffective in combating price discriminations secured by large powerful buyers.

The allegations of discriminatory and unfair business practices on the part of the chains led to unrest and demand for the protection of small business. Inequities secured through mass distribution gave rise to alarm among small distributors in the trades affected, to organized agitation by trade associations composed of such distributors, and to assorted proposals for legislative curbs on the practices of corporate chains.

In his introduction of the bill, Representative Patman explained the purposes of the bill and the evils to be corrected. He said:

This bill is designed . . . to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitors.

The House Judiciary Committee reported:

The purpose of this proposed legislation is to restore as far as possible equality of opportunity in business by strengthening antitrust laws and by protecting

trade and commerce against restraint and monopoly for the better protection of consumers, workers, and independent producers, manufacturers, merchants and other businessmen.

The overriding policy of Robinson-Patman was equality of opportunity—equality for all. It was not directed toward special favors for any one interest group. Rather, it demanded that all purchasers be treated alike, unless there was some actual cost savings which justified unequal treatment. The Robinson-Patman concept of price-equality, or equal start, is intended to insure a competitive framework which will encourage the presence of a maximum number of efficient units.

Congress decided that in the economic sense, in the prevention of monopoly, it is desirable to have the greatest number of small efficient economic units in existence in order to insure that the customer will benefit by lower competitive prices. Then the larger problem of monopoly would not have to be faced.

So Congress, in 1936, acted on the belief that the handmaiden of monopoly is discrimination and that discrimination if allowed to continue leads to monopoly.

Now, with this background in mind, Congress passed the Robinson-Patman Act as a business code of "fair play" for the purpose of protecting small business from the inequities of unjustified discriminatory business practices.

None of the recent reports have demonstrated that the Robinson-Patman Act has outlived its usefulness. None of them have done that. If the business practices which led Congress to enact the Robinson-Patman Act no longer existed—if the goals of Robinson-Patman were no longer legitimate—if Robinson-Patman were no longer viable—I, myself, would urge its repeal.

But much the opposite is true. Unjustified price discriminations—secret rebates—illegal brokerage are still very much with us. If anything, the practices have become more sophisticated—more clandestine in nature. To say that there is no longer a need for Robinson-Patman is to misjudge our contemporary competitive climate.

In an economy characterized by an ever growing tendency toward concentration, there is now more than ever a need to strengthen, not weaken, Robinson-Patman. Misbehavior practices, unabated, result in concentration. Misbehavior practices are the handmaiden of concentration.

Although the Justice Department has concurrent jurisdiction over the act, the principal burden of its enforcement has fallen on the Commission. Over the 34-year history of the act the Department has issued few complaints charging Robinson-Patman violations. As a matter of fact, the Department routinely refers Robinson-Patman type complaints to the Commission.

I am reminded, Mr. Chairman, of a question I once asked an Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. You know, you get out the Clayton Act and you will find there are two empowering sections in the act. Section 11 is where the power of the Federal Trade Commission comes from. We have the powers except those which are vested in other administrative agencies. But section 15 is an empowering section of the Depart-

ment of Justice, and it says something like this, I don't know whether I can remember it or not, but it says that the Attorney General of the United States, through his respective assistants, shall—it doesn't say might, it doesn't say he is going to send it over to the Federal Trade Commission, it says "shall," shall enforce sections 2, 3, 7, 8, and so forth. And I put the question: "You have read it. Are you carrying that out?"

He said, "No."

"Why not? There is plenty of work for everybody."

Anyway, it is an interesting question. Ask Mr. McLaren that question when he gets up here, that is, whether he is going to enforce the act.

Amid the complexities of the modern economy the Commission's emphasis should not be away from the administration of this important law. Rather, we need to devote more men, more money and more of our enforcement tools to combat those discriminatory practices which are threatening the existence of small business.

I cannot agree with the economists who view the plight of the small businessman as a cold statistic, whose importance is often obliterated by the "broad" view of our economy. I cannot condone the demise of the small efficient merchant who does not have the "clout" of the "big fellow" and tell him calmly that "economically speaking you are not worth saving."

That is what they are saying to you if you break down all that fancy language they write, that is what it adds up to.

I can't say that and Congress didn't say that. Congress in Robinson-Patman sought to insure equality of opportunity among purchasers. It offers no subsidies—it provides no guarantees—it doesn't aid the inefficient. It merely protects against unjustified differences in treatment.

I don't know what stimulates some of our academic people. Certainly they must know that we don't have a free economic system in the literal sense. What we have got is a restrained system so you can have as much freedom as possible. The Federal Trade Commission Act is a restraint on freedom. The Sherman Act is a restraint on freedom. And the Robinson-Patman Act is a restraint on freedom. But these were things that Congress passed after they had studied facts, and had a debate. They were facts that were before Congress when this law was passed.

Now, when President Kennedy appointed me Chairman of the Commission in 1961, I was no stranger to Robinson-Patman. As you know, I began my career in public service as a staff attorney with the Federal Trade Commission. I have been personally involved in all phases of enforcement of the act. I have interviewed injured businessmen, and have seen firsthand the effects of discriminatory pricing. I've seen the good the act has accomplished throughout the years, and I can also see how much is left to be done.

It has been said that we have been mired in trivia. That in focusing our attention on the small businessman we have had little effect on the economy as a whole.

Such is a myopic observation. A review of our record—of the respondents, the industries, the business practices, which have been the

subject of Commission action—clearly demonstrates the impact of the act.

Our critics frequently argue that whereas the act was intended to help the small businessman, the Commission has most frequently turned it against small business. They then cite scores of Robinson-Patman cases involving businesses not named in the Fortune 500 Directory. These critics have fallen victim to the urge to cite cold, meaningless statistics to back up their argument of the moment.

Many of the cited cases against so-called small businesses were involved in the Commission's efforts to proceed industrywide in such areas as apparel, food, brokerage, the seafood and salmon industry, citrus fruits and other industries where disregard for the law and consequent injury to countless small businesses were found to be running rampant. These industries were generally made up of great numbers of what our critics call small businesses.

The Commission found that the most practical way to proceed in these situations was on an industrywide basis and, therefore, it obtained numerous orders, both consent and litigated, from broad cross sections of these industries. Such orders are cited by critics as attacks on small business under the guise of the Robinson-Patman Act.

How stupid that is. Across the board, I hear the suggestion that we don't know whether or not these orders we have got are being complied with. Tommilyrot, we are well informed. For instance, we know what a good job we did in the apparel industry.

However, again these individuals have failed to go beyond the mere recitation of statistics. They have not gone to any of these industries to determine the effect of the act's enforcement. They didn't go out and ask questions and find out for themselves, the just hauled off and said it isn't working.

The fact of violations in such industries was quite clear. The Commission could not ignore its duty to enforce the act merely because the industries were primarily comprised of businesses smaller than General Motors and others. Many small businesses in these industries begged for assistance in the face of the open abuse of Robinson-Patman restrictions.

I remember the delegation that called upon me from the wearing apparel industry. Fifty of them walked in my office and said, "Mr. Chairman, we have had all the advice we can stand, will you sue us? I don't trust him and he doesn't trust me. And somebody bigger than all of us in this room is putting the squeeze to us. And this results when somebody says to me, 'I don't care what promotion you are giving to somebody, that is what I want, if you don't give it to me I'll get it from somebody else.'"

Now what they were saying was what? "Give all of us the same kind of treatment so we can trust each other."

And we gave them that treatment. We got several hundred orders to cease and desist, literally hundreds. We held them up until we were sure in our own minds that we had all of the substantial leaders in those various fields. One of the best jobs the Commission ever did, in my opinion, was right here. The records are there, look at them.

We would have been derelict in our duties had we not enforced the act. Rather than just citing numbers, let our critics go to those indus-

tries and show, if they can, that the act has injured small businesses. Bring that man in here who said "The Federal Trade Commission ran me out of business because they enforced Robinson-Patman." I still can't believe that anybody can sell that point. They just say it without proving it.

Moreover, the firms of the Fortune 500 Directory are well represented in the indices to FTC decisions. Obviously, these 500 firms constitute a very small percentage of the vast number of firms existing in our competitive economy.

It is thus reasonable to accept the fact that in fulfilling our statutory duty, which in no way is based on an assumption that only the largest firms would indulge in the proscribed practices, that the Fortune firms would not appear in our case load in a greater percentage than presently exists. In fact, it has been my experience over a number of years that our problems in this field do not lie primarily with the firms which have already attained status within the Fortune 500 Directory. These established firms with their competent counsel, have sought to avoid those practices which would lead to involvement with the Commission in a Robinson-Patman proceeding. They can't afford to be caught. It is too expensive for somebody that big. Of course, there have been exceptions, and it is these exceptions which have led to our proceedings against these "large" corporations. It is with the firms not in the Fortune category, those firms which have attempted to attain the status by discriminatory practices, and thus add to concentration and a lowering of competition, that we have had to concentrate our efforts.

And it would be naive to judge the effectiveness of the work of the Commission by considering only its formal action.

I am so sick of this, this is the last time I am going to say this. You are not going to hear me make this speech any more, because if you want to play the numbers game, God bless you, play it. All I can tell you is you are not going to get anywhere by doing it. It may make a person say, "I'm better than he was," or, "This administration is doing a better job than the other one." But if you'll just scratch a little bit you are going to find out somebody's giving you a snow job.

Mr. HUNGATE. Be careful. One fellow said he would never run for office again, you know.

Commissioner DIXON. I have heard that. [Laughter.]

Mr. POTVIN. Mr. Chairman.

Mr. HUNGATE. Yes, sir.

Mr. POTVIN. Mr. Commissioner, I think that what you are perhaps pointing out here is what could be termed a pebble in the pond effect, and I think that this subcommittee and your agency have much in common. Now, it is not unusual for one of the staff members of the House Small Business Committee to spend indeed many hours, many days at work on a case, let us say, as an example, a case where a service station operator has been allegedly mistreated by his supplier. And I suppose that, in terms of cost accounting, it would develop that there has been more money spent on that individual, that practice, that violation, than could be justified, but yet is it not true, sir, that if it is called to the attention of your agency or your sister enforcement agency and corrective action is taken, that much more is done than disciplining, in terms of law enforcement, one supplier, but that it is,

hopefully, a painfully instructive example to an entire rather large industry?

Commissioner DIXON. Yes, sir.

Mr. POTVIN. The benefits go far beyond the case in question.

Commissioner DIXON. Well, I am sure before you let me go, I will be asked this, or maybe I should say it here. Many of these statistics indicate that we had so many investigations. In reality, many of these statistical "investigations" were basically one broad investigation. We may have sent out a section 6(b) demand to a number of firms in an industrywide investigation, and it's like throwing a net. However, each time that a section 6(b) demand went out to somebody, there was an investigational number assigned, and it became a statistic. It seems like these were 5,600. And when it was all sifted out and looked at and refined, we might find several things would come from an investigation, such as saying, "We don't really have enough substance here to challenge anybody," or we will again make a statement or guide to give some kind of guidance, put out a rule, or bring several lawsuits. Now, that is the way they are disposed of. But the effect of throwing the net, so to speak, and asking and looking has a great beneficial effect. That is what I think was one of your points. And then much has been said about the dairy industry. I have become so tired of milk I don't even want to drink it any more. I don't know of any industry in the United States that has been going through the most violent kind of change as this industry. Here is an industry that once was dominated by thousands of small independent packers of milk. And here they were competing in a market with some large regional and some large national dairies. But all of those people were trying to sell to somebody even more powerful, the big chainstores. And the big chainstores had enough power to integrate backward and pack milk for themselves. So that kind of leverage exists. And then introduce into it the fact that the chainstore cares nothing about selling Hungate's milk, it just wants milk with its name on it. So that evil thing called private label came creeping in. And then you put all those things together, the big buyer over here, and someone big enough that has other advantages in other areas, and the ability to maybe bid and meet his price, and put a little fellow in the middle, and he is just squeezed like this.

We have looked at those things, we have been in 25 States with men. We have closed most of these cases. However, as we would come—some good would be done, the alleged illegal practices would disappear. We have been asked "Please come in, at least maybe it will do something." Our investigations did do a lot of good. But I might say that we haven't been too successful in getting enough facts that would be sustained in the setting of a plea of good faith meeting defense, and cost justification.

Now, we are reexamining the whole milk problem at the Federal Trade Commission. It is high time we did it. Because at the same time that we have been looking for these behavior practices, we have been over here in the structural field of merger, confining and cutting off the ability of the big guys to buy anybody without our permission. So we find ourselves confronted with a kind of a problem like this. Here is a man down here getting hell beat out of him. He is just bleed-

ing, he has got a little blood left. And he wants to sell to a fellow that we said can't buy anybody. And so we have got some problems in this thing. But they don't mean the law is no good. The law is excellent. It may mean we haven't been able to figure out how to use it. It may have been used improperly, and maybe it shouldn't have been used.

The effect of an order against a particular named respondent is not limited to that respondent, nor even to his industry. The order will affect other industries, other firms and related business practices as well. In delineating the law, the Commission defines the boundaries of permissible conduct and assists businessmen in compliance with the law.

There has been some adverse comment by our critics on the fact that there are fewer Robinson-Patman complaints being issued today than in the past. Now I am going to use some figures in a minute and I am going to make some of these guys downright damned liars, sir. That is just what I want to call them, all of them that used it. And I am not manufacturing these things. This is the truth, right here.

There is no denying this statistic but it is interesting that these same critics are the ones who criticize the Commission for engaging in the "numbers game." Would they have us litigate every case? This is obviously not feasible. We simply do not have the manpower. To do so would severely limit the effectiveness of the Commission.

In order to extend the thrust of Robinson-Patman enforcement as far as possible, we have adopted certain procedures which facilitate enforcement without case-by-case litigation. Assurances of voluntary compliance, advisory opinions, rules and guides, are all designed to maximize the Commission's resources in its administration of the act.

Now, I want you to pay attention to this, and I would like to give you some idea of what the Commission has been doing in Robinson-Patman enforcement. Since 1937 there have been approximately 5,227 investigations initiated in this field. Now, that is 34 years. Interestingly enough, under this Commission where I have been chairman and have just been succeeded, this Commission that hasn't done anything, well over 50 percent of those investigations were conducted during the 1960's. I tell you, if we didn't do anything, the previous Commission sure did less. Compared to the previous 24 years, over 50 percent of the investigations have been initiated in the past 9 years. From 1960 until the present date, 3,067 Robinson-Patman investigations have been initiated. Only about 110 of those have not been completed and acted upon to date.

The products involved in these investigations—now let us see how stupid we've been. Have we been planning well? What is the most important area to the consumer—food, apparel, housing, transportation? The products involved in these investigations run the gamut from goats milk to the steel industry. Certain basic industries such as groceries, bakery products, dairy products, wearing apparel, gasoline and auto parts, have received concentrated and repeated attention.

We have 44 people to plan for you, and if they can beat that basic planning, there's where the action is. Since 1937, 1,344 Robinson-Patman complaints—now, that's the total for 34 years have been issued. This includes 589 complaints issued from 1960 to date, 589 out of 1,344.

Out of the total of 1,344 complaints docketed, 1,045 have resulted in final orders issued by the Commission. So they had pretty strong reason to believe and they won in that many instances. That's a fantastically good record to be proud of. Only about 1½ percent of these orders (15) have ultimately been overturned by the courts, only 15 of those orders in all that time, in a law that people describe as the most complicated law ever put on the books. The only people who have ever had any trouble with this law are a bunch of hide-bound lawyers that are on the outside practicing law that want to tell their client, "This is something terrible." Some mighty fine fees is what it gets them.

In the case of the Commission dismissals, it should be noted that a substantial number of dismissals involved reasons other than the legal merits, such as policy considerations, actions pending in other agencies, discontinuance of the practices involved with little or no chance of resumption and the fact that the respondent had gone out of business.

The case statistics, however, tell only a small part of the story. In the early 1960's, as I told you, the Commission "turned the corner" on enforcement through the case-by-case method. I believe I just showed you that during this time we have done more than 50 percent of the total record. Although not ignoring litigation, as is shown by the previous statistics, more and more emphasis was placed on voluntary regulation and rules and guides. This, in my opinion, was the only logical answer to a rapidly expanding economy being watched over by an agency which was expanding in manpower and resource only at a snail's pace. When I came to the Commission in 1938, the Commission had slightly over 700 employees. New businesses were born that weren't even thought of. Between 1938 and 1961, when I came back to the Commission, it was just about the same size. It only had less than \$8 million, and thank the Lord, with support of the members of the Small Business Committee and with the support of, a great deal of support from Congressman Evans, who sits on the Independent Office Appropriations Committee as its chairman, the Commission now has about 1,280 employees and we've got about \$20 million. If we really had a \$50 million appropriation, there's \$16 billion worth of advertising now and we've only got about a hundred people to look at it. I come up here and say we don't have enough money and my new chairman came up here the other day and said we had a million and a half dollars that wasn't committed, he didn't think he had to spend it, and they cheered him. I hope he's right. And I am going to help him all I can to be right. But I tell you, we've got a lot of things to do and we don't have enough hands.

This, in my opinion, this turning towards these things was the only logical answer to this rapidly expanding economy, as I said.

Now, since the mid-1960's, about 92 investigations into discriminatory practices were closed on the basis of assurances of voluntary compliance. So now you must add those to this result, because, I insist, we have obtained the same result as we had if we said cease and desist. Cease and desist doesn't make a man stop. It tells him to stop, and it tells him if he continues we can certify him for civil penalties for \$5,000 a day for each violation. That can get expensive. But we had 92 of these voluntary compliances. Now, during the same period we

issued 96 advisory opinions, 96—these have been published. This is a new body of law that is emerging, it is outside of the case book. It's binding, it's advisory, it's helpful to people and it includes Robinson-Patman situations submitted for opinions by various businessmen. These were request for opinions that came in from various businessmen. Also during this time, the Commission issued its revised 2(d) and (e) guides, following the Fred Meyer decision. Now, I wrote the Fred Meyer decision, and I was hopeful and felt that if we could take the law that far it was going some, to get it interpreted that way. And the court, as Mr. Elman told you this morning, on a separate opinion that he wrote, went all the way down to the customer of the wholesaler. And industry screamed and said we couldn't go that far, that this would be the end to all cooperative advertising. This is the first thing they do, you know, they throw their hands up.

Prior to that decision they knew they couldn't discriminate in price so they turned to discrimination in the form of something else, promotional allowances, and they were only giving it to the big boys. And these discriminatory allowances were given only to people that they sold directly to, so they contended that they weren't discriminating between their customers because they only sold to the direct purchaser. It was easy. But they would sell to a wholesaler or distributor that would resell down to the little fellow who wouldn't get any of the allowance at all. And so now, after the *Fred Meyer* decision these suppliers had to figure out how to do it. And we very patiently put out some guides and various Commissioners have explained these. We have met with the business community. We had many meetings with the grocery manufacturers, for instance, and explained these in great detail. We learned a lot ourselves. But I tell you that that one decision, if that is all you've got out of 9 years of enforcement, was well worth it.

The impact of these more informal procedures must be added to our list of docketed complaints in order to get a true picture of the act's present day effectiveness. And speaking of its effectiveness, I would venture to say that there would be no adverse criticism directed at the act in the various "Reports" of today and yesteryear, if it were not effective.

The prospects for Robinson-Patman appear to be bright. I am confident that this subcommittee will continue to reflect the broad congressional interest in the market entry and successful operation opportunities of the efficient small businessman. Practical common sense demands no less. For if efficiency and ingenuity are the bellwethers of our rapidly expanding economy then there must always be a place for small business in this country. Over the years the Supreme Court has displayed a commendable sensitiveness to the aims and goals of Robinson-Patman with two notable and lamentable exceptions—the *Standard Oil* and *Automatic Canteen* cases. Now, Mr. Chairman, in the late fifties, when I was serving as counsel to the Antitrust Committee over in the Senate, we held 2 years' of hearings and 10,000 pages of testimony were taken. I got calluses from sitting. Reports were made to try to strengthen the act or to redefine the harm that was done by both Standard Oil, especially Standard Oil. We got nowhere, not in the Senate. One year over here it

passed the House, but it got caught on the last night in the Senate. From that day on, it doesn't do any good to try to pass that act. But you should know it. And Automatic Canteen. I heard my colleague, Commissioner Elman, saying he would hope that under the new leadership and this new movement that we will turn more and more to the buyer. Well, ever since Automatic Canteen it hasn't been so easy. Now you have to carry a burden of proof to where you have to show that the buyer either knew or should have known that the man that sold it to him couldn't cost justify it and didn't have a good faith defense and that he violated the law. Now, that's a pretty damned good burden to carry, I tell you, a hard one to carry.

And we have done pretty well ever since that decision. We had a few 2(f) cases. And the reference was made to some of these that have been dismissed. Well, they have been dismissed and I'm not going to stand here and tell you a, b, c. You've got the records, you've got the minutes. I could tell you a whole lot, but it would be something you can read. I think you can use your time more valuably.

I am proud of the Commission's record where aggrieved parties sought judicial review of Commission orders in Robinson-Patman cases.

Now, you know, it is a strange thing to me, the one court that doesn't seem to be having any trouble with the Robinson-Patman law is the Supreme Court. If we can ever get to the Supreme Court we don't have any trouble. Now we have some trouble getting there sometimes. Because if we win on review by the appellate court, then of course if certiorari is sought and granted, we are defended in the Supreme Court by the Department of Justice. But where the lower court, the appellate court, doesn't agree with us, we go hat in hand over there to the Solicitor, and we ask him—now, mind you, we have to go over there and ask our lawyer to represent us. If he disagrees with us, we can't fire him, we are stuck with him. And if he disagrees with us, this pretty well ends it. And we have had some pretty good disagreements. I remember one disagreement we had with respect to the *Anheuser Busch* case that has fogged this law since the day they wouldn't take that case. And it has a big effect, too.

Now, there have been 95 cases in which respondents have petitioned a U.S. Circuit Court of Appeals for review of a Commission Robinson-Patman order. This was during this 9-year period. In 68 of these instances—I think that's the whole period; it is the whole period—in 68 of these instances the Commission's position has been accepted and the orders affirmed; 68 out of 95 over 34 years. In only 27 instances did the circuit court of appeals reject the Commission's position and vacate the Commission's order. The Supreme Court of the United States has been even more receptive to the arguments and positions urged by the Commission in Robinson-Patman matters. In 21 reviews of Federal Trade Commission Robinson-Patman cases the Commission's position has been vindicated 19 times, 19 out of 21. It should be pointed out that in 13 cases the Supreme Court was overturning a dismissal entered by a circuit court of appeals. So that of a total of 95 orders reviewed in the courts the Commission's position has been affirmed 80 times. I know of no other administrative agency that can boast of such a record in the courts. Now, if there is one, I would like for somebody to show it to me.

Recent court developments are particularly encouraging to those of us who share an interest in Robinson-Patman enforcement. First, we had the Supreme Court decision in the *Utah Pie* case. And, oh, how the Robinson-Patman critics cried—indeed, the Neal report suggests that it be overruled by legislation. And the criticisms of the case make me wonder how many of the critics have actually read the case.

I agree with Dr. Brooks in his testimony before this subcommittee wherein he pointed out the misconceptions of Utah pie. Long may it stand.

But there are other just as compelling and well reasoned recent decisions in the courts that lead me to believe that a new day in Robinson-Patman enforcement is dawning. I invite your attention to the *Perkins* and *Fred Meyer* decisions of the Supreme Court. In those cases the Court got back to the basics of the original intentment of the act and clearly demonstrated that the statute reaches all price discriminations, at any level, which have the requisite statutory effects. And now promotions and promotional moneys must be made available to all competitors at the level of resale to which the promotions are directed.

Recent decisions of the U.S. court of appeals have given definite indications of a more favorable climate for Robinson-Patman enforcement. The U.S. Court of Appeals for the Seventh Circuit recently upheld the Commission in our *National Dairy Jams and Jellies* case. This excellent decision realistically sets out the metes and bounds of a primary line injury case. And I want to talk about primary line in a minute. A recent decision of the U.S. Court of Appeals for the Ninth Circuit in the *Fowler* case reaffirms our firmly held beliefs as to the criteria to be used in assessing the probability of injury in a secondary line case. Another recent decision of major importance to the continued viability of the enforcement of the Robinson-Patman Act is the opinion of the first circuit court of appeals in the *Forster* case. In a well-reasoned opinion the court held that a decision of the Federal Trade Commission was a “final judgment or decree” within the meaning of section 5 of the Clayton Act and thus could be used as *prima facie* evidence in treble damage litigation. This, of course, strengthens public enforcement of the statute and will aid immeasurably the two-pronged method of enforcement envisioned by Congress.

Just in reading this statement, I am reminded, I wrote the decision in *National Dairy* which we won. And there is another case I should have mentioned, another *National Dairy* case that involved the costing question. These things have to be established, long and hard. I wrote that one. I wrote the *Forster* one. I wrote *Fred Meyer*. I am wondering what those other fellows were writing. We had a lot of criticism but we won them all.

Let me just add one final thought. Any criticism of Robinson-Patman Act enforcement must reflect, at least indirectly, on the staff charged with enforcement of that statute. I want to state unequivocally that, in my opinion, our staff, considering the vast expanse of the economy involved, the tremendous number of complaints received, and notwithstanding unjustified criticism, has done an outstanding job in fulfilling the mandate of Congress. Stated very plainly, I am proud of the staff and I don't want to apologize for a damn one of

them. I have read in the reports that I put all my cronies in the Commission, and all they've got to do to straighten the Commission out is to remove my cronies. Commissioners have stated, on requests for money going over to the Budget Bureau, that they have got to oppose the budget as long as it is under the present management.

Now, all I can say to those gentlemen is this. In 9 years at the Federal Trade Commission, charged with those responsibilities that I had to fulfill as the Chairman, and I could not share them, I made choices. I honored what I call the career system and I make no apologies for it. Some people, of necessity, we found outside, but you give me the choice by a man that has spent his life in a career. I make no apologies if I can find an opening for him at the top. I don't think it is necessary to bring in these 21- or 22-year-old geniuses and put them on top of them. I think that a good, honest effort in a career needs to be rewarded by the challenge of leadership. And so that was my system that has been criticized.

One other thing that occurs to me, and this has some effect upon what you are trying to understand about the Commission. Much was said about the powers of the Commission. At one time three of my Commissioners, Mr. Elman, Mr. Nicholson, and Miss Jones, assumed, by a vote of 3 to 1, that the powers of the Chairman weren't what I had understood them to be, and they challenged them. That led to my request for a ruling by both Civil Service and the Attorney General of the United States. Now, there were all kind of articles written about that, and I was taken pretty much to task. But guess what happened. Just the other day the letter came in, and it just happened I was right. The ruling is flat cold turkey, my position was right and they are wrong. I want you to put that in the record so everybody can read it. Nobody else would put it anywhere.

Mr. POTVIN. Mr. Chairman.

Would it be possible, Commissioner, to obtain a copy of that letter?

Commissioner DIXON. You sure can. You can have mine.

Mr. POTVIN. Thank you, sir.

Mr. HUNGATE. If there is no objection, it will be admitted at this point.

U.S. CIVIL SERVICE COMMISSION,
Washington, D.C., February 2, 1970.

HON. CASPAR W. WEINBERGER,
Chairman, Federal Trade Commission, Washington, D.C.

DEAR MR. CHAIRMAN: We regret that it has taken so long to make a final response to the March 5, 1969 letter of former Chairman Paul Rand Dixon concerning which parts of the Federal Trade Commission are "major administrative units" as that term is used in Reorganization Plan No. 8 of 1950. We found it necessary to consult with a number of executive branch officials on this matter and that consultation took time.

In discussing the matter referred to in the former Chairman's letter we feel it essential at the outset to state that neither the Chairman of the Civil Service Commission nor the Commission itself has any specific statutory authority to decide the question upon which Mr. Dixon and the other members of the Federal Trade Commission differed. The Civil Service Commission does, however, have the authority to decide whether an individual has received a valid appointment in the civil service (as that term is defined in 5 U.S.C. 2101) for the purpose of determining the applicability of the various laws and regulations that we administer. It is on the basis of the latter authority that the conclusions in this letter are made.

Reorganization Plan No. 8 of 1950 (5 U.S.C.A. App. p. 236) provides in

section 1(b)(2) that "The appointment by the Chairman [of the Federal Trade Commission] of the heads of major administrative units under the Commission shall be subject to the approval of the Commission." Identical language appears in section 1(b)(2) of Reorganization Plan No. 9 of 1950 (5 U.S.C.A. App. p. 238) relative to the Federal Power Commission; section 1(b)(2) of Reorganization Plan No. 10 of 1950 (5 U.S.C.A. App. p. 239) relative to the Securities and Exchange Commission; section 1(b)(2) of Reorganization Plan No. 13 of 1950 (5 U.S.C.A. App. p. 241) relative to the Civil Aeronautics Board; and section 2 of Reorganization Plan No. 6 of 1949 via section 104 of Reorganization Plan No. 7 of 1961 (5 U.S.C.A. App. p. 225, 350) relative to the Federal Maritime Commission.

As noted in Mr. Dixon's letter, from 1950 when your Reorganization Plan became effective until January, 1969 the term "heads of major administrative units" was interpreted as encompassing only the positions of Secretary, Executive Director, General Counsel, and the Directors of the Bureaus in the Federal Trade Commission. On January 31, 1969, the majority of the Federal Trade Commissioners voted to extend the interpretation of the term to include the 63 positions referred to in Mr. Dixon's letter. The former Chairman expressed the opinion that the extension voted constituted an illegal intrusion into the powers of the Chairman of the Federal Trade Commission. Our study leads us to the conclusion that the first interpretation made in 1950, while perhaps appropriate at that time, is too limited for today's organization and that the extension voted in 1969 is unduly broad.

While we have found no conclusive definition of the term "major administrative units", we are of the opinion that it must be interpreted in the light of basic personnel law. The Congress in enacting the Classification Act of 1949 established the "General Schedule" which is a basic compensation schedule divided into eighteen grades of difficulty and responsibility of work. The General Schedule (which, since the codification of title 5 of the United States Code in 1966, appears in section 5104 of that title) contains some significantly descriptive language relative to the classes of positions that involve the heads of Governmental organizations. We are of the opinion that the language used by the Congress in 5 U.S.C. 5104 affords appropriate reliance in determining what the Congress meant by the language in the Reorganization Plans, "heads of major administrative units."

Before discussing the language in 5 U.S.C. 5104 we want to make clear that we agree with the implied conclusion in the 1950 opinion of the then Federal Trade Commission General Counsel W. T. Kelley that the word "administrative" in the term "major administrative units" is to be given a broad interpretation and is not limited to units engaged exclusively in administrative or executive work as distinguished, for example, from units such as the General Counsel's Office and the Office of Hearing Examiners. We also agree that former General Counsel Kelley was correct in concluding that the word "major" is a relative one and that among the large number of units in the Federal Trade Commission "there is a considerable area of discretion in determining which are 'major' * * * provided this is not carried to the extent of designating a majority of the administrative units as major."

The descriptions in 5 U.S.C. 5104 used for grading positions at grades GS-14 through GS-18 contain language pertinent to the problem at hand. Copies of those statutory provisions are attached. We feel it particularly significant to note that grades GS-14 and GS-15 refer to an individual who is "* * * head of a major organization within a bureau * * *"; that GS-16 refers to an individual who is "* * * head of a major organization * * *"; and that GS-17 and GS-18 refer to an individual who is "* * * head of a bureau". As used in the statute the word "bureau" is interpreted to mean a major subdivision of an Executive agency. In some agencies the word "bureau" is seldom used and the major subdivisions are termed "divisions" (e.g., the Securities and Exchange Commission Division of Corporate Regulation).

We are of the opinion that the language in the statute used in the GS-14 and GS-15 descriptions, which shows the organizations referred to therein as being within a bureau and, hence, subordinate to the head of a bureau, is sufficient to establish that the incumbent of such a position could not be considered the head of a "major administrative unit." We are aware that there are positions within the bureaus of the Federal Trade Commission that are graded at GS-16 but we are not basing our determination here exclusively on grade but on a combination

of grade and the statutory description of the type of organization contained in 5 U.S.C. 5104.

With respect to the descriptions for GS-16, GS-17, and GS-18, we believe the language in each equates with that in the Reorganization Plans so that an individual in one of those grades who is either the head of "a major organization" which is not within a bureau, or is the head of "a bureau", is the head of a "major administrative unit" within the language of the Reorganization Plan. Under this interpretation the following positions are subject to the approval of the Federal Trade Commission:

- (1) Secretary
- (2) Program Review Officer
- (3) Executive Director
- (4) General Counsel
- (5) Director, Office of Hearing Examiners
- (6) Director, Bureau of Deceptive Practices
- (7) Director, Bureau of Economics
- (8) Director, Bureau of Field Operations
- (9) Director, Bureau of Industry Guidance
- (10) Director, Bureau of Restraint of Trade
- (11) Director, Bureau of Textiles and Furs

All other positions in the Federal Trade Commission may be filled by the Chairman of that Commission without the approval of the Commission.

Pursuant to your oral request we will take no action on the matter of the assignment of Dr. George Dobbs to the position of Chief of the Division of Scientific Opinions, and the matter is considered withdrawn.

Sincerely yours,

ROBERT E. HAMPTON, *Chairman.*

Enclosure.

CLASSIFICATION OF POSITIONS

* * * * *

(14) Grade GS-14 includes those classes of positions the duties of which are—
 (A) to perform, under general administrative direction, with wide latitude for the exercise of independent judgment, work of exceptional difficulty and responsibility along special technical, supervisory, or administrative lines which has demonstrated leadership and unusual attainments;

(B) to serve as head of a major organization within a bureau involving work of comparable level;

(C) to plan and direct or to plan and execute major professional, scientific, technical, administrative, fiscal, or other specialized programs, requiring extended training and experience which has demonstrated leadership and unusual attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or

(D) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

(15) Grade GS-15 includes those classes of positions the duties of which are—

(A) to perform, under general administrative direction, with very wide latitude for the exercise of independent judgment, work of outstanding difficulty and responsibility along special technical, supervisory, or administrative lines which has demonstrated leadership and exceptional attainments;

(B) to serve as head of a major organization within a bureau involving work of comparable level;

(C) to plan and direct or to plan and execute specialized programs of marked difficulty, responsibility, and national significance, along professional, scientific, technical, administrative, fiscal, or other lines, requiring extended training and experience which has demonstrated leadership and unusual attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or

(D) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

- (16) Grade GS-16 includes those classes of positions the duties of which are—
 (A) to perform, under general administrative direction, with unusual latitude for the exercise of independent judgment, work of outstanding difficulty and responsibility along special technical, supervisory, or administrative lines which has demonstrated leadership and exceptional attainments;
 (B) to serve as the head of a major organization involving work of comparable level;
 (C) to plan and direct or to plan and execute professional, scientific, technical, administrative, fiscal, or other specialized programs of unusual difficulty, responsibility, and national significance, requiring extended training and experience which has demonstrated leadership and exceptional attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or
 (D) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.
- (17) Grade GS-17 includes those classes of positions the duties of which are—
 (A) to serve as the head of a bureau where the position, considering the kind and extent of the authorities and responsibilities vested in it, and the scope, complexity, and degree of difficulty of the activities carried on, is of a high order among the whole group of positions of heads of bureaus;
 (B) to plan and direct or to plan and execute professional, scientific, technical, administrative, fiscal, or other specialized programs of exceptional difficulty, responsibility, and national significance, requiring extended training and experience which has demonstrated exceptional leadership and attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or
 (C) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.
- (18) Grade GS-18 includes those classes of positions the duties of which are—
 (A) to serve as the head of a bureau where the position, considering the kind and extent of the authorities and responsibilities vested in it, and the scope, complexity, and degree of difficulty of the activities carried on, is exceptional and outstanding among the whole group of positions of heads of bureaus;
 (B) to plan and direct or to plan and execute frontier or unprecedented professional, scientific, technical, administrative, fiscal, or other specialized programs of outstanding difficulty, responsibility, and national significance, requiring extended training and experience which has demonstrated outstanding leadership and attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or
 (C) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications.

Pub.L 89-554, Sept. 6, 1966, 80 Stat. 446.

Commissioner DIXON. Now, I believe in the Robinson-Patman Act, I believe in its enforcement. I am sure that after your consideration and reevaluation of the statute in the light of the tremendous problems facing today's small businessman you will reaffirm the interest and concern of Congress in the enforcement of the Robinson-Patman Act.

Thank you.

Mr. HUNGATE. Thank you, Commissioner.

Counsel.

Mr. POTVIN. Mr. Chairman.

Mr. Commissioner, as you know, we have been discussing the by now somewhat notorious pink sheet coverage of the new Chairman's testimony. May I assume you are familiar with the article in question?

Commissioner DIXON. Yes, I know that. I don't read it very often. I try to keep my blood pressure down somehow.

Mr. POTVIN. Well, without commenting on Mr. Werble's predilection for interrupting the news, suffice it to say that the headline on the article on the new Chairman's testimony was "Moratorium on Robinson-Patman Complaints." This, of course is somewhat fictional. It was a consensual statement delivered by the new Chairman on behalf of all four of his colleagues, including yourself.

Could you say for the record, sir, whether it is your understanding these is to be any moratorium on Robinson-Patman enforcement?

Commissioner DIXON. If it is I will make a speech on Pennsylvania Avenue the first day I find out about it.

Mr. POTVIN. Did it not strike you, sir, that—

Commissioner DIXON. Absolutely that's wrong, Mr. Potvin. We have no such understanding, no such intention, and I haven't heard anybody say so.

Mr. POTVIN. And indeed the Chairman's language was rather noted for its lack of being opaque in that respect. It was explicit that there would be at least as much and hopefully more.

Commissioner DIXON. I think that is correct.

Mr. POTVIN. Thank you, sir.

I should think that perhaps the very most useful function that you could serve at this time, sir, is the leaving of some residual advice here today. You have just completed what Chairman Dingell, I believe quite justifiably, considers a very distinguished tenure as Chairman of a very effective agency.

In studying the allocation of relatively limited staff and money because of the budget of the bureau at your agency, and the just perfectly normal tasks that you are being given in increasing terms by the Congress, and by circumstances, do you have any particular feelings as to the relative place of Robinson-Patman enforcement in the overall hierarchy of priorities?

Commissioner DIXON. You must know what I think about it because it has been made available to you, our budget over the years. When you run the cards over any given year of the totality of the effort including the men in the Division of Discriminatory Practices, and then the men in the field, the economists that are brought into play, and the Commission's time, you will find that the sum of money being spent on Robinson-Patman would run roughly somewhere near \$2 million.

Mr. POTVIN. Do you, sir, see any conflict between the total bundle of consumer rights and needs and either the abstract concept of Robinson-Patman or, indeed, the implementation of that act?

Commissioner DIXON. If I understand your question, do I see any conflict between the act and the consumers?

Mr. POTVIN. Yes, sir. There are those who profess to see some.

Commissioner DIXON. I don't know of anything that benefits the consumer as quickly or over the long-range pull, either way you want to look at it, than a strong enforcement of antitrust laws, and this certainly includes the Clayton Act as amended by the Robinson-Patman amendment.

Mr. POTVIN. Lastly, sir. One of the other allegations that has been tossed at this podium time and time again during these hearings is that there has been some sort of a predilection toward involvement in

"trivia" down at your agency. Would you care to speak briefly to that point?

Commissioner DIXON. Well, what is one man's trivia is somebody else's substance, you see. It depends on what end of that trivia you are on. If Congressman Hungate were to have a delegation of his constituents call on him and present him with a problem that properly lay in the domain of the Federal Trade Commission and he sent it down there, somebody could say that it is trivia. I don't know what he would think about it, but I don't think he would take it very kindly. But some things are more important than others. The word "trivia" really kind of got banded in in reference to some of our textiles and fur work. Now, here are four acts that the Congress whittled out of the Federal Trade Commission Act, which declares that unfair methods of competition, or unfair and deceptive practices are wrong. You see, that is broad. It was unfair to say this is virgin wool if it isn't. That was already there. But they thought so much of the wool problem that they passed a Wool Products Identification Act, and then they followed that with the Fur Products Identification Act, and finally the Fabrics Act, and now it has been amended, and then the last one is the Texfile Act. Now, these were special responsibilities Congress gave the Commission. Congress sets our guidelines, you know. And we don't have a whole lot of people in this bureau. I think they have done maybe the best job at the Commission, and it rather galls me to see the people doing this effective work being told that they are just wasting their time on trivia. You tell some woman that it is trivia to protect her from some unscrupulous merchant that advertises an old dyed pussy cat and calls it sable and sells it to her, and I don't think she will have any trouble saying that we do need people going around inspecting these tags and looking at them and giving advice, and in the event we catch them to sue them and get the practices stopped.

Mr. HUNGATE. Commissioner, I appreciate your remarks in the latter context. I think we have a great upsurge of concern of the consumer, at least in print, and many agencies or officials down in the fine print say that they will take any landmark cases that come in, they will take them. The others, they will have to refer them to their own lawyers because they are just too big and too busy, and I guess "trivia" is the word they would be applying to those things. And I, for one, I would like to see the Government take an active part insofar as it can in these matters.

Now, counsel mentioned to you a point that we have had at least I think two witnesses and perhaps more on the problem he raised. The testimony, as I recall it, was that, why should we protect these small businessmen, why are they any better than factory workers, isn't the ultimate interest the lowest price to the consumer, and isn't that the person in whom we should be properly interested because we are all consumers?

Commissioner DIXON. That is an awful hard thing to explain to a body politic or consumers. A consumer cannot see much beyond the nose. For instance, if there is a destructive price war going on with sales beneath cost, having predation written all over it, who enjoys it more than anybody else? Consumers.

Mr. POTVIN. In the short run.

Commissioner DIXON. Now, just a minute. I remember one time when I was counsel advising Senators, not Congressmen, about similar hearings. I used to talk a great deal to my longtime friend, Everette Mac-Intyre, who was over here with this committee. And we were exchanging some thoughts. The most unwise thing you can ever do is to present your political bosses in the market where the bargain is. They will run you out of town. You don't take him there. You take him over in the next market where the price is high, and you ask the question, "Why are you mad at those nice people over there? Why don't you sell them at the same price that you are over yonder?" That is the other side of the coin. You win him every time. But you will get run out of town over on that other side. So, you see, the consumer only sees one side. He sees the one that he is getting immediately. But take him over here and you ask, "Who is paying for that act over there? You are. How do you like it?"

And that is the story of monopoly. You let this go on and then it disappears, and then you pay for it. Now, you have a hard time explaining that to a housewife. But that is the reason antitrust laws are so valuable. They are more valuable than all of this other talk about consumerism put together. That doesn't mean you can ignore all that we are hearing about consumerism. But antitrust laws are the greatest thing that we have got in this country, protecting this country from the jungle, eating itself up alive.

But I keep on, after 30 years, asking the question, "Are we doing enough, are we losing, are we ahead, where are we?" Where are we now with Robinson-Patman? Are we doing a good job? Is it enough? What do you need to do more? What are the problems?

I don't think there is anything basically wrong with the statute. I think that a couple of opinions cause a little more difficulty in enforcement. We have no problem with the secondary line case. We do have problems in the primary line case. And don't you forget it. The law that was passed intended us to have a problem, it wasn't supposed to be easy. Because the Congress didn't say stop all price discrimination, it said stop those that may substantially lessen competition. That's the only one to stop. And you begin to ask, "You are a national operator, so how do you sell your products?" He says, "Well, I divide the country into 50 principal markets." As far as he is concerned, those are 50 countries. And then he says, "I allocate so many dollars for promotion." If it's by the case, so much per case, this is the way.

"How do you spend it? Do you spend it all at one time or evenly?"

"Oh, no. We know what percentage, relative percentage we have in this market, and we may have 55 percent, and we look over in the next one, we have only got 10. We say what in the world is the matter, what have we got to do?"

Well, the first thing they say they have got to do is to get the consumer to try the product.

"How do you do that?"

"Give it to them or sell one and give away one."

Discrimination. That is the only place he is doing it.

Now, is that against the law as soon as he does it? It is against the law when he does what? Will he substantially lessen competition and tend to create a monopoly? When does a promotion become a practice? Can you define it?

And all these people, little business, big business, talking about law violations are just talking. They are doing a whole lot of talking. And when we go in there, after complaint, maybe we will be 2 weeks behind when we get men in there, wham, it's gone, and he moves over here to the next place.

That is the reason that the economists and lawyers say you can take a law and Balkanize America. You understood competition is a delicate thing, and it is not an easy problem, to deal with. It takes ingenuity, and it takes facts.

Now, I am not one of those fellows that says you have to have predatory intent. Although we sit down at the Commission and argue with each other and write about predatory intent. If you have predatory intent, you don't even have to go beyond it, just prove there was intent. You don't have to have too much more. That persuades most everybody if you have got that. But you don't have to have intent. It doesn't say a thing in the statute about it. What you have to prove is that there is a discrimination, and that it cannot be cost justified, and that it cannot be offset by the defense of meeting competition, and that it may substantially lessen competition, and then you can say, "Stop it." And even when you say "Stop it," you have the darndest problem in the world drawing an order that is any better than the language of the statute. And so you have got a problem. Now, people say to me, "What do you want to do about it?" I say, "Nothing, leave it alone, leave it alone."

Mr. HUNGATE. Mr. Wertheimer.

Mr. WERTHEIMER. No questions.

Mr. HUNGATE. Mr. Potvin.

Mr. POTVIN. No questions.

Mr. HUNGATE. Mr. Oden.

Mr. ODEN. No questions.

Mr. HUNGATE. I, on behalf of the committee, again want to extend our appreciation, and, Commissioner, I hope that your enthusiasm can be communicated to the whole staff.

Commissioner DIXON. Well, we have got a good staff and they deserve some accolades instead of the scratches they have been getting, Mr. Chairman.

Mr. HUNGATE. Thanks again for your services.

The next witness to be called, James M. Nicholson, please.

TESTIMONY OF JAMES M. NICHOLSON, ESQ., WALD, HARKRADER, NICHOLSON & ROSS, WASHINGTON, D.C.

Mr HUNGATE. Mr. Nicholson, we are very pleased to have you with us here. I see you have a prepared statement.

Mr. NICHOLSON. Yes, Mr. Chairman.

Mr. HUNGATE. Please proceed.

Mr. NICHOLSON. Mr. Chairman, I am pleased to appear before you today at your request and to present a very short statement on the Robinson-Patman Act. I will be glad to respond to any questions, of course, that you and the staff may have.

The Robinson-Patman Act is a subject which is very difficult to discuss calmly, as I am sure you are aware from the hearings that have

gone before. There are those who, in their stanch advocacy of the act, equate everything other than unquestioning loyalty as almost subversive of the American system. There are others who, in their stanch opposition equate support of the act as "reactionary" thinking which impedes the growth and development of our economy. I should like to disassociate myself from either of those views. I am encouraged to believe that these hearings are providing a forum in which a less emotionalized evaluation of the act and its enforcement can be made. I think that is reflective of the hearings that I have been listening to today as well as the testimony preceding this, which I have read.

I assume, for purposes of this statement, that no substantial reworking of Robinson-Patman is imminent and that the law will remain on the books essentially unchanged. If this is the case, then it seems clear to me that the mandate to the Federal Trade Commission is clear: to administer the law in the most objective, enlightened and useful way.

The most heartening development in these hearings to date, in my opinion, occurred last Friday, February 27th, when the new Chairman of the Federal Trade Commission, in delivering a statement on behalf of the Commission, announced a study of the Commission's enforcement efforts, the first step of which was a review of the effect of all orders issued in approximately the last 10 years. I am confident that such a study will lead to a better sense of direction and cohesiveness to its enforcement efforts. I am hopeful that this study will lead to a development of a planned program of enforcement. In the past the Commission has relied, I think, too much on the disposition of individual matters as a means of communicating policy to the public and to the Commission staff.

The committee has been furnished with the voting records of the individual Commissioners on each of the Robinson-Patman matters since 1960 or 1961. I believe that this sort of "box score" is wholly inadequate as a means of measuring the devotion of individual Commissioners to the act or as a measure of his views. As pointed out by Chairman Weinberger, however, there is a real difference of opinion among the Commissioners as to the investigatory policy of the Commission. Some Commissioners feel that a disproportionate amount of its resources is devoted to investigate cases which are subsequently closed, while others feel that this investigatory activity has strengthened compliance with the act. To assist the Commission in resolving the difference of opinion, it would be helpful if the tabulation furnished to this Committee included:

1. The staff recommendation to the Commission, and, if that recommendation was for closing, the reason for that recommendation;

2. The number of hours devoted to the matter at the time of the Commission action—I would suggest a request for the estimate of hours for completion when a complaint is recommended, but that kind of information is not available under current procedures.

3. The total hours devoted to Robinson-Patman enforcement for each of the years of the tabulation.

This information will indicate, I think, that there is a very substantial proportion of the budget allocated to the enforcement of the Robinson-Patman Act which is devoted to matters which are closed upon the recommendation of the staff. In most cases the recommenda-

tion is made on a staff finding of insufficiency of evidence, insubstantiality of competitive effect, or the conclusion that there is no violation. If I am right on the high proportion of enforcement dollars devoted to closed cases, the Commission should seek to establish by some kind of empirical evidence whether this has adequate enforcement value.

It is good business—good business for public institutions as well as private—to ask periodically: What have we done, and how well have we done it? These questions are necessary prerequisites to the next and even more important questions: Where do we go from here, and how can we improve on what we have done? I would therefore suggest that the tabulation be further expanded to include the following information:

1. The industry involved;
2. The geographic area affected by the alleged discrimination;
3. The identity of the source of the complaint. And in this connection I don't suggest the name of the complainant be furnished, but merely the category, whether it is the staff, a competitor, a customer, a source (vendor) or other class of complainant.
4. The estimated volume of business of the respondent;
5. Any other complaints, or actions, filed against this respondent—In this connection, I would also suggest that this kind of information be provided with respect to others in the industry, but that too is the kind of input which I do not think is available under present Commission methodology.

This kind of analysis included in that tabulation would help identify problem industries and provide the Commission with some of the information necessary to develop a planned program of Robinson-Patman enforcement.

There have been some additional steps taken toward a programmed enforcement of the act over the last few years. For example, this committee has made constructive suggestions to the Commission from time to time of areas to which it has thought the Commission should direct its Robinson-Patman efforts. In your report of December 31, 1968, on "Small Business Problems in the Drug Industry" you made three recommendations to the Commission:

1. The holding of appropriate proceedings to determine the area of competition between hospital pharmacies and small, privately owned community pharmacies;
2. Take appropriate steps to define the "own use" exception of the Non-Profit Institution Act of 1938; and
3. Investigate apparent violations indicated in the testimony before the committee and to vigorously prosecute actual violations.

The committee then requested that the Commission report back to this committee on or before January 15, 1970, on steps taken in this direction. This kind of industry approach to Robinson-Patman enforcement should be given careful consideration, I think.

Another problem area which has plagued the Commission and which it is now reexamining, is the so-called "stocking dealer." In a number of instances over the years, the Commission has held that a wholesaler who operates a warehouse in which he keeps a stock of goods of his supplier is not entitled to any differential in price attributable to

the cost or expense actually incurred by the dealer. While it is of course true that a stocking allowance or discount can be used as a subterfuge for a discriminatory preference, in some industries all dealers stock to a greater or lesser degree and this kind of allowance is accepted as a form of doing business. In declining last year to give an advisory opinion (Advisory Opinion Digest No. 333), the Commission reported that it would no longer endorse or condemn this kind of allowance pending the study in a rulemaking proceeding of the "stocking dealer" problem. This is the kind of open mindedness in the area of Robinson-Patman that is increasingly evident at the Commission and I think should be encouraged.

In connection with its announced review of the effect of outstanding orders, I would suggest that consideration be given to several factors in addition to the effect of the orders, which I understand from Chairman Weinberger's testimony is the thrust of the proposed study. Robinson-Patman orders, which continue in perpetuity, require the expenditure of time and effort by the compliance staff of the Commission; however, many should be either withdrawn or at least enforcement ought to be suspended. Prefinality act orders, to the extent that they were not appealed and thus subject to a court order of enforcement, have little continuing viability. In a recent matter in which the Commission sought to reopen a prefinality order, it wound itself the subject of extended litigation which I believe has finally been terminated by a withdrawal of the matter by the Commission with prejudice. This proceeding, since there was reason to believe that a violation of the law had occurred, should have been initiated as a new matter. The same generally holds true with respect to all of the Commission's prefinality orders.

With respect to orders subsequent to the Finality Act, some sort of periodic evaluation ought to be made. If it appears that a company under order has been in compliance for an extended period of time, consideration might be given to a vacation of the order. In a dynamic society such as ours, companies change, managements change, policies change, and distribution systems are constantly changing. A practice which was the subject of an order may shortly be obsolete. In these instances, it is unfortunate if public funds are continuing to be expended upon fruitless compliance programs. Rehabilitation may be as valid a concept in Robinson-Patman as in the criminal law. Prospectively, the Commission might consider putting a definitive term on its Robinson-Patman orders so that a respondent in compliance for a period of years would be released from the order automatically, or an order might be vacated after an appropriate period if the respondent demonstrated compliance for that period.

Careful study by the Commission of the drafting of its orders also has merit. And this is a point that Commissioner Dixon just made. Too often "boiler-plate" orders to cease and desist are utilized. I am inclined to believe that flexibility in the orders issued under the Robinson-Patman Act would enhance Commission enforcement of the act. For example, a respondent might be ordered to notify his customers or his suppliers that he has been found to have granted or obtained discriminatory benefits and is under order. The threat of this kind of disclosure with the incident danger of private treble

damage actions or complaints by his suppliers to the Commission for violations of the order by soliciting preferences might induce respondents under order, and potential respondents as well, to be somewhat more careful about violations of the act. Another means of giving better credibility to Commission enforcement of Robinson-Patman might be to open Commission files more generously to potential treble damage claimants upon completion of Commission proceedings. These kinds of innovations could be helpful.

None of these suggestions, however, or those of other witnesses at these hearings, are likely to be a panacea. It is difficult to predict the success of any particular change. However, it would appear that a greater flexibility by the Commission and a willingness to try new approaches might enable a better enforcement program and utilize the Commission's Robinson-Patman appropriations more effectively.

At this point I would like to deviate just a moment from what my prepared remarks to mover and comment upon a matter that was referred to both by Commissioner Elman and by Commissioner Dixon. This is the criticism that has been leveled at the Commission in the Robinson-Patman area, as well as other areas of enforcement, for the voluntary and industrywide approaches which were initiated by Chairman Dixon back in 1960. In my opinion, these are effective devices. That program has been one of the most significant and important innovations at the Federal Trade Commission in its 55-year history. And I think this committee ought to go on record in its report of these hearings, commending that kind of procedure, in many instances involving businessmen who violate the law unintentionally or who are in areas where the law has not been defined or made clear. If the Commission continues its voluntary procedures, it seems to me that the business community benefits and the enforcement agency benefits much more than it would if the Commission brought formal proceedings against these people. And I think that is truly a very significant and very important innovation that Chairman Dixon instituted, and I would hate to see it lost in any new planning at the Commission.

While I have been troubled and continue to be troubled by the emotional rhetoric surrounding the Robinson-Patman Act and its enforcement, I am reasonably hopeful that a serious and expeditious evaluation of its recent history, and a more thorough one than has been suggested to date, can produce new enforcement policies that can assure its vitality and relevance.

It has been an honor to be here and testify. Thank you.

Mr. HUNGATE. Thank you very much. That is a very well reasoned and well presented statement, and obviously reflects your experience in this field. And I think the committee should find your suggestions as to implementing the effectiveness of the Commission to be most helpful.

Counsel?

Mr. POTVIN. Mr. Chairman.

Mr. Nicholson, as you know from monitoring today's hearings and reading the transcript of recent ones, we now have, apparently, a solid consensus of all five of the present members of the commission that there simply is no conflict between the Robinson-Patman Act and consumer interest. I should think it would be a most helpful addition

to the record, however, to have you, as the Commission's most recent alumni, add your views on that question.

Mr. NICHOLSON. I think that the policies underlying Robinson-Patman and a careful and thoughtful program of enforcement are not in conflict with the interests of the consumer. I think all of the antitrust laws are, as Chairman Dixon said just before he left the stand, significant to the consumer and perhaps more significant than any specialized legislation in this field or particularly directed at the consumer.

Competition, a self-regulation of business in a free market, is the most significant and important protection to the consumer that we have. We will not have that unless we have vigorous enforcement of the antitrust laws by the Commission and the Department of Justice.

Mr. POTVIN. Mr. Nicholson, as a significant, indeed, central participant in the discussions down at the Commission on R-P in recent years, it seems to me we ought to firmly establish what you envision your role as having been. Would it be fair to say that while you have from time to time had individual and, indeed, strong views on the manner of enforcement or manner of implementation, this does not put you on the side of those who feel that there should not be a Robinson-Patman Act?

Mr. NICHOLSON. Definitely not. I disagreed with my fellow Commissioners from time to time because I thought, frankly that we sometimes acted without sufficient knowledge or basis. I am aware that our society and our economy is a changing one and I felt at times we were adhering and applying the law as the economy of this country was in 1936 rather than as the economy of this country was in the late sixties. And I think the law must be applied in the context of the economy as it exists today. The Robinson-Patman Act is not a device for restructuring the economy. The Robinson-Patman Act is an act to preclude discriminations within the context of the economy as it exists. And it seems to me that we must look to those areas in which discriminations have their greatest impact and greatest adverse effect on competition. I am not sure that the Commission always homed in on those situations, and that frankly concerned me.

Mr. POTVIN. So that your point is not that the act is not currently relevant but simply that from time to time you have felt that its implementation could have been more currently executed?

Mr. NICHOLSON. Exactly.

Mr. POTVIN Thank you, sir.

Mr. HUNGATE. Counsel.

Mr. ODEN. Mr. Chairman.

Mr. Nicholson, in your statement you discuss the possibility of the Commission having a procedure where they could vacate an order. This is, I think, kind of a novel suggestion. One thing, from my understanding of a Commission cease and desist order, actually it is not a conviction in the traditional sense, it simply tells the respondent that the Commission has found that he has violated the statute, he must stop, and if he doesn't stop a penalty action will be instituted against him. So I don't see what good it would do to—

Mr. NICHOLSON. The Compliance staff of the Bureau of Restraint of Trade, which is separate from the Division of Discriminatory Prac-

ties, devotees, in my opinion, substantially more than half of its time to compliance with Robinson-Patman orders. In my opinion, orders that frequently have no relevance to that business of that company under order as it operates today. The orders are directed against a particular practice that perhaps has gone out 10 years ago. But, by virtue of still having that order, you must periodically review compliance with it. I am suggesting that it is unfortunate to devote a portion of the compliance resources of the Commission to old matters which I think study would show have no continuing relevance, and therefore, I would suggest that those orders ought to be wiped out so that the Compliance staff could be freed to give better impetus and input into current orders, rather than adding them on to the string of all the orders that presently exist.

Mr. ODEX. That is a great benefit to the public and the Commission both, isn't it, the fact, even if the Compliance Division couldn't possibly check every order that they have, that when they are informed that a company is violating, say, the Robinson-Patman Act, they look back and find that they already have an order in effect against the company, they don't have to go back and retry the case.

Mr. NICHOLSON. Yes, they do, because the order relates only to the practice of which they have been found guilty.

Mr. ODEX. That is what I was referring to, that they are still doing the same thing.

Mr. NICHOLSON. Oh, well, if they are doing the same thing, then the order ought to continue in existence. My point is that over a period of 5 or 10 years, practices change and the practice which is prohibited in a particular Commission order may no longer be relevant to that industry, may no longer be used. So why have that order continue in effect?

Mr. ODEX. As I say, I was referring to something like a basic 2(a) violation where this could have happened 20 years ago, it could happen tomorrow or 10 years from now.

Mr. NICHOLSON. Even there you have to look to the language of the particular orders, and some of them are so narrowly drawn that even that may not have any continuing relevance.

Mr. HUNGRAY. I think that suggestion has considerable merit for study. In a rough way it seems comparable to me what I think they do in criminal law in some sections with probably juvenile or more youthful offenders. If they satisfactorily complete probation, then they expunge the original conviction. It would compare perhaps to drivers' license violations where if you accumulate so many points you lose the license, but if you drive so many years without violation—

Mr. NICHOLSON. You wipe out those points.

Mr. HUNGRAY. The points are wiped out. And it would be a comparable approach.

Mr. NICHOLSON. Exactly, Mr. Chairman, the thought that I had. And if you later find, after an order has been vacated that respondent violating that stricture of that order, you can bring a new case, which you are really going to have to do anyway. There have never been any 2(a) penalty cases. And you can use that old record to get a tighter or a broader order.

MR. HUNGATE. And it is your thought this would free a lot of manpower for more realistic problems?

MR. NICHOLSON. Yes, exactly.

MR. HUNGATE. Just a moment. I had a couple matters.

Your suggestions are worthwhile. I am not an overstatistic man, yet at the same time if we throw them all out, we have got to have some way to measure what we are doing. Such suggestions as to time were good, but it seems to me that might be very difficult to implement.

MR. NICHOLSON. You mean time spent—

MR. HUNGATE. Page 3, you talk about the number of hours devoted to the matter, and total hours devoted to Robinson-Patman enforcement.

MR. NICHOLSON. I think what I was suggesting there, Mr. Chairman, is that perhaps we might find that there are many, for example, like the *AMC* case, a tragic example of devotion of something over \$400,000 of the Commission efforts and budget to that case, which ended up in nothing. Now, it seems to me that if there is a pattern in industries of difficulty of proof, where matters are closed, or where you just cannot get ahold of the problem, this may well suggest that there are some statutory changes which need to be made. But until you begin to do a more pervasive kind of study and inquire just exactly where is our dollar going, and how much bang are we getting for it, we are all talking in an uninformed sort of way. I don't think that is conducive to real solutions to problems, real or imagined.

MR. HUNGATE. At first blush, your suggestion of the study of figures on the basis of industry, geography, source of the complaint, volume, so that you could identify problem industries, that sounds to me like it would be worthwhile.

MR. NICHOLSON. Problem industries, or problems geographically. Sometimes you will find, I think, and I look at his just from my own experience of evaluating individual matters—I think you will find that there are areas of geographical significance. So that perhaps the Commission ought to beef up a field office in a particular area, or get some expertise in the Robinson-Patman area developed in the particular field office. But until you have this kind of input, the Commission can't relate its efforts anyway, it seems to me.

MR. HUNGATE. Once again, thank you, unless there are further questions.

MR. ODEN. I have a question.

MR. HUNGATE. One more question.

MR. ODEN. Following the discussion, the chairman was talking about regarding the industry involved, the geographic area, and all, isn't that actually something that the staff of the Commission is supposed to do right now before they actually go out with a large field investigation and spend all this time and money investigating a complaint that might be fruitless?

MR. NICHOLSON. You are aware, I am sure, Mr. Oden, that the Commission today has delegated to the staff the right to initiate investigations. I think if this kind of input is reported back to the Commission, the Commission can then judge more adequately the exercise of that delegated responsibility by the staff, and that is what I have in mind in those suggestions.

Mr. HUNGATE. Once again, thank you very much for your helpful testimony, and we appreciate your being with us.

Mr. NICHOLAS. Thank you.

Mr. HUNGATE. The witness will be excused, and the next, I understand we have Mr. Alvin Lee Morse, or perhaps this is the statement that Mr. Marvin left; is that correct?

TESTIMONY OF ALVIN LEE MORSE, FEDERAL LEGISLATIVE COUNSEL, NATIONAL COUNCIL OF SALESMEN'S ORGANIZATIONS, INC.

Mr. MORSE. I am appearing here today on behalf of the National Council of Salesmen's Organizations, Inc.

Mr. HUNGATE. We are very pleased to have you with us representing the National Council of Salesmen's Organizations, Inc.

That is your prepared statement?

Mr. MORSE. Yes, Mr. Chairman.

Mr. HUNGATE. Well, Mr. Morse, you may proceed as you wish.

Mr. MORSE. Thank you very much, Mr. Chairman.

While I do have a prepared statement, I prefer to summarize it for emphasis, if that is satisfactory?

Mr. HUNGATE. You may proceed as you wish.

Mr. MORSE. Thank you, sir.

We are the parent organization for 59 nationwide salesmen's groups whose members serve all our Nation's industries and whose compensation is derived from sales commissions paid by those whose products they sell.

I would like to briefly convey to you today our thoughts as to the role of commission salesmen in a free enterprise economy. Frankly, our members were quite perturbed by news reports that as a result of these hearings, the Robinson-Patman Act might be repealed or caused to suffer weakening amendments. We feel that any weakening or elimination of the operative provisions of the Robinson-Patman Act, particularly sections 2(a) and 2(e) would release the dagger already pointed at the heart of America's commissioned salesmen and many of the customers we serve.

If anything, the law must be enforced and strengthened.

For some years now we have been in touch with the Federal Trade Commission and with the Congress to express our deep concern with certain discriminatory practices which adversely affect both the interests of the wholesale salesman and the distribution economy as a whole. We have urged stricter enforcement of the Robinson-Patman Act and have sought a means of adding teeth where none now exist in order to effectuate the will of Congress to insure fair play in the marketplace.

Let me give one example—a hypothetical example—of a situation which we feel is rampant in today's economy, where a proliferation of mergers has made for mammoth buying organizations, each seeking to secure favored treatment because of its own mass purchasing power.

A typical case involves the elimination by a manufacturer of a salesman in order to sell directly to a large user. This user, a large retail chain operation, insists that he should be "a house account" and, as

such, entitled to receive a lower price to reflect the absence of a sales commission normally paid a salesman by the manufacturer. The manufacturer normally utilizes commission salesmen to distribute his products. If the large chain is granted a discount based upon such a cost "saving," then all of the smaller, independent business in competition with the chain in the same area would suffer. Thus, not only does the salesman lose compensation, but harm is done to a normally competitive situation, that is, competition is substantially lessened between the chain operation and other, smaller businesses who buy from salesmen.

It would seem that, in the case presented, a violation of section 2(a) and/or section 2(c) would have occurred. Our belief is that section 2(a) would actually be violated in the case given, as involving an unjustifiable price discrimination substantially lessening competition. We also maintain that there would also be a violation of the brokerage section of section 2(c).

We, therefore, urge that the Robinson-Patman Act be amended to prohibit price discrimination based on fictitious selling cost savings.

In discussing this matter with officials of the Federal Trade Commission some time ago, we pointed out that in the *Brock* case the Supreme Court held it to be unlawful for the broker to cut his commission in order to secure a specific order for his products. We say that for a manufacturer to cut the price by eliminating the salesman's commission is equally discriminatory.

I refer now, Mr. Chairman, to the distinction between a brokerage charge and a salesman's commission, because it seems that the existence of a Robinson-Patman violation hinges upon such a distinction.

When we discussed this case with the FTC we were advised that while it appears that savings in the salary expense of salesmen are a recognizable source of cost justification, the Commission had expressly disapproved of brokerage cost savings as part of permissible cost justification. It is entirely possible, they pointed out, that under present Federal Trade Commission thinking, the elimination of commissions should likewise not be recognized for cost saving purposes and thus constitute a violation of section 2(a).

However, we were advised by the Commission staff that legislation rather than administrative proceedings would appear to be the appropriate remedy.

Therefore, the legislation which we would propose amends section 2(a) to provide for Robinson-Patman violations in the case of any sales transaction which could be effected through a commissioned salesman either at the option of the buyer or the seller. No differential in the cost of the sale could be attributed to the participation or non-participation of such a salesman in such a transaction.

So, while as salesmen we are, of course, primarily concerned with our own narrow economic interests, it is quite apparent that independent businessmen are also injured by a substantial lessening of competition where the house account relationship arises between a manufacturer and a large distributor, and the sales commission eliminated.

If section 2(a) were to be strengthened by our amendment no longer would legislative intent be circumvented by the so-called cost justifica-

tion expense, nor could such clear cut language give rise to any interpretation other than that which is clearly stated.

It is also our feeling that the publicity accompanying an amendment of this kind would serve to educate commerce and trade as to the provisions of Robinson-Patman generally, as well as do away with one of the prime loopholes for discriminatory pricing.

The small businessman, the salesmen, and the customer are hard pressed today by the ravages of inflation and by the inroads being made by corporate giantism. One of the factors causing the greatest problem for those I have described is the ability of the favorite buyer to receive preferential treatment at the expense of the average salesman. Of course on larger scale, while we hope that our legislation will be introduced, considered, and enacted in the near future, we also feel that probably the greatest impetus to strengthening and improving the Robinson-Patman Act is the attention given by this committee and we feel that continued legislative oversight is the first and foremost assurance that the great goals of Robinson-Patman will be achieved and that the will of Congress is carried out within a dynamic and rapidly changing environment.

Thank you.

MR. HUNGATE. Thank you very much Mr. Morse. Any questions, Mr. Potvin?

MR. POTVIN. No questions, Mr. Chairman.

MR. ODEN. No questions.

MR. HUNGATE. On behalf of the committee I thank you for appearing here and pointing out another significant area, problem area that merits study.

As I have indicated in previous hearings, my father was a traveling salesman and I am somewhat familiar with some of the problems you relate, and the transfer of the independent wholesaler-salesmen relationship to the house account put several automotive parts people completely out of business. Those of us who were being supported thereby regretted that.

Thank you very much Mr. Morse.

MR. MORSE. Thank you very much, Mr. Chairman.

TESTIMONY OF LYNN PAULSON, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL INDEPENDENT DAIRIES ASSOCIATION

MR. HUNGATE. We're going to give you the door prize for patience in waiting for so long Mr. Paulson.

MR. PAULSON. Thank you, Mr. Chairman. I am happy that you did want to stick it out because I did want to appear on this record.

Mr. Chairman, I represent the National Independent Dairies Association. I am the executive vice president and general counsel. We have a very particular interest in the Robinson-Patman Act. We have benefited very much from the fact that it is on the books and from the fact that the Federal Trade Commission has been working with it, and we want it to stay on the books and I want this record to show that opinion and I want the record to show that on behalf

of my members that we appreciate your committee's efforts to bring into focus the issues and allow people to express themselves on them.

I had 25 years with FTC from 1936 to 1963. FTC was a new agency when I went there.

It was born in 1914 and while there are 22 years between 1914 and 1936, FTC didn't function much before 1936, partially due to the interruption of the great depression. We had one volume of decisions to study. Then each one of us who was hired as an attorney for the Commission. This is the way it should be today. We were dedicated to the proposition that it was our job to serve the Commission in furtherance of their duties, to enforce the policy expressed in the act. It didn't matter what pay we drew because it was a service to your country to help maintain the competitive system.

Mr. HUNGRIDGE. The Chair does recall 1936, and you were lucky to have a job.

Mr. PAULSON. Yes, quite true.

I think the basic problem with the Federal Trade and all the other administrative agencies today is that today Government is bureaucratic. Individuals can not perform to the best of their ability. The law is still excellent and the men of this country are still excellent but bureaucracy is stifling individual effort. The problem is one of law enforcement and if we could reduce bureaucracy and restore individual effort, we would have better enforcement.

The Robinson-Patman Act prohibits one of many unfair methods of competition—discrimination. The word connotes unfairness. It is one of the unfair practices that are encompassed in section 5 of the FTC Act which prohibits all "unfair methods of competition."

If you allow the big companies with unlimited capital to use their pocketbook power, they can destroy the small simply by unfairly underpricing to a few. If this were completely stopped a seller would have to lower his whole price structure and the price structure would more accurately reflect merit and efficiency. We haven't had the full benefit of the Robinson-Patman Act. Witness the fact that we now have chain stores in place of local groceries. Some six or seven food chains do the bulk of food merchandising in the United States in place of 100,000 home town stores. If you will look at the 1934 FTC report to the Congress, the chainstore inquiry, you will see that the explanation for their growth is discriminatory pricing, special discounts. That is when Congress passed the Robinson-Patman Act. It was designed to stop those special discounts. Had it been fully enforced the normal growth of chains would not have taken place.

The effect of the abnormal growth of chains has been to destroy local enterprise. The effect of price discrimination is to abnormally develop bigness. An important portion of our market has been lost to food chains. Now they are so powerful they can set the out of store price. They don't necessarily have to have a profit on milk. They can use it in their product mix formula to draw customers to the store and look for an over-all store profit. We have much more centralization of the grocery business in the United States, than we would have had, had we had full enforcement of the Robinson-Patman Act. The chain reaction of abnormal distribution through chains reaches ours and other industries, thereby reducing hometown growth and development. Of

6,000 hometown dairies when the boys came home from World War II, 600 remain today. Attrition is still at the rate of 50 a year. Each of these hometown dairies employed 50 to 100 people. If we could stop price discrimination, efficiency would become the test of survival and there would be more local hometown industry.

We would like to ask that the attention of this committee, also be directed to another provision in the Robinson-Patman Act, section 3, which prohibits nondiscriminatory below cost selling. In 1936, when Congress amended the Robinson-Patman Act to make it more effective with regards to price discrimination, it recognized from NRA experience, the harmful effects of selling below cost.

In 1936, Congress put the principal of NRA code--no selling below cost--into law in the form of section 3 of the Robinson-Patman Act. This provides that selling at unreasonably low prices for the purpose of suppressing competition or eliminating competitors is unlawful. We can't get the enforcement agencies to enforce the law and are trying to get Congress to provide for private enforcement by passing S. 1494. Predatory below cost selling and the threat of it are destroying local enterprise. Private enforcement is the key to the effectiveness of anti-monopoly legislation. Ninety or 95 percent of the law that has been developed against price discrimination was born in the minds of private practitioners. The *Utah Pie Case* and *Moore v. Meade's Fine Bread* are cases in point.

I must commend Rand Dixon for carrying the enforcement of the law forward, even developing some new law because he brought the *National Dairies* case, the *Jam and Jellies* case, he was telling you about, and successfully prosecuted it and it was affirmed in the circuit court.

With further reference to the growth of the food chains, let me just add that if people in the United States think it is a better way of distributing food and that they are enjoying economies they are wrong, for, according to FTC, the food chain system as we know it today, results in a tax upon the people of \$4 billion a year. FTC points this out in a price study on bread and milk made at the request of Secretary of Agriculture Freeman. FTC reasoned it this way—the gross profit margin required by food chains to make 1 percent on sales, is 24 percent. I'm speaking of 2 or 3 years ago, I suppose, it is 25, now. Food chains have to mark their goods up on an average of 25 percent. FTC found that local supermarkets in several States studied made a good profit on an 18-percent markup as against the 24 percent markup required by the food chains. Thus, if we had stopped the price discrimination which gave rise to food chains, we would be saving the American public \$4 billion a year. We would still have 2,000 independent dairies and thousands of stores instead of what we have, with all that that would mean in the way of opportunity at the local level.

I want to say that I hope the final report of this committee will emphasize the fact that the issue in discrimination is really one of fairness, because then they will be on sound ground.

Critics of Robinson-Patman, authors of the Neal report, the Stigler report, and the American Bar Association report have been very superficial and ungenuine in their approach.

Are the authors of these reports really against the elimination of un-

fair competition? Do the people that wrote those reports really believe that discrimination in prices is fair within the American ethic of fair play?

Do they believe or does anyone believe that we can have a competitive system and preserve a land of opportunity in America without having fairness in the market place?

So you see, what we need is the extension of the basic American ethic of fairness which is codified in section 5 of the FTC Act. If FTC and Justice and the State authorities and the private attorneys will think in terms of fairness when approaching trade matters, we will have a good, healthy, competitive system.

The Robinson-Patman Act is in line with this philosophy and we should keep it. But more emphasis should be placed upon section 5 of the FTC Act which prohibits all unfair methods of competition.

It is a tribute to our people and to our country that we should prohibit "unfairness" in just that term. We will preserve our competitive system if we fully implement this law.

I appreciate this opportunity to speak on behalf of National Independent Dairies, and as a graduate of FTC.

Mr. HUNGATE. Thank you very much for your remarks. They're helpful to the committee and we again appreciate your time and are sorry that we didn't arrive here sooner, but you know how these committee hearings have to go.

Mr. Potvin?

Mr. POTVIN. No questions.

Mr. HUNGATE. Mr. Wertheimer?

Mr. WERTHEIMER. No questions, Mr. Chairman.

Mr. HUNGATE. Mr. Oden?

Mr. ODEN. No questions.

Mr. HUNGATE. That will conclude the hearings for today and the committee will be adjourned until 10 o'clock, Wednesday next, at which time Richard W. McLaren, Assistant Attorney General for Antitrust, will be appearing as our first witness.

The committee will be adjourned.

(Whereupon, at 4:20 p.m., March 4, 1970, the subcommittee recessed until 10 a.m., Wednesday, March 11.)



SMALL BUSINESS AND THE ROBINSON-PATMAN ACT

WEDNESDAY, MARCH 11, 1970

HOUSE OF REPRESENTATIVES,
SPECIAL SUBCOMMITTEE ON SMALL BUSINESS
AND THE ROBINSON-PATMAN ACT OF THE
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 2359, Rayburn House Office Building, the Hon. John D. Dingell (chairman of the subcommittee) presiding.

Present: Representative Dingell.

Also present: Gregg Potvin, general counsel; T. J. Oden, subcommittee counsel; and Fred M. Wertheimer, minority counsel.

Mr. DINGELL. The subcommittee will come to order.

This is a continuation of the hearings of the Special Subcommittee on Small Business on the Robinson-Patman Act of the Select Committee on Small Business of the House of Representatives.

We are continuing our general inquiry into antitrust laws, mergers and the Robinson-Patman Act.

Our witness this afternoon is the distinguished Assistant Attorney General, Antitrust Division, the Honorable Richard W. McLaren.

Mr. McLaren, we are honored that you would be with us this afternoon. The Chair will, after you have introduced your associates there at the table, recognize you for such statement as you choose to give.

TESTIMONY OF RICHARD W. McLAREN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION; ACCCOMPANIED BY BRUCE B. WILSON, SPECIAL ASSISTANT TO MR. McLAREN; AND JOSEPH F. ROSENTHAL, POLICY PLANNING SECTION, DEPARTMENT OF JUSTICE

Mr. McLAREN. Thank you very much, Mr. Chairman.

With me on my left is my special assistant, Mr. Bruce Wilson, and also with us today is Mr. Rosenthal of the Policy Planning Section of the Antitrust Division.

Mr. DINGELL. Would you like to have Mr. Rosenthal at the table with you, sir? Mr. Rosenthal, you are certainly most welcome to join the Attorney General there if you so desire.

Gentlemen, we are privileged to welcome you three to the committee for such statement as you choose to give.

Mr. McLAREN. I appreciate very much the opportunity to appear and testify before the committee today. I have handed up a rather lengthy prepared statement with the chairman's approval, I will cover

the substance of the report as a whole, and leave the balance of the prepared statement for the printed record.

Mr. DINGELL. Without objection the statement will appear in full at the end of your testimony and, Mr. McLaren, you are welcome—you are recognized for such comments as you choose to make.

Mr. McLAREN. Thank you, Mr. Chairman. I should say also that time has not permitted clearance of my prepared statement by the Bureau of the Budget, but I think that basically poses no problem.

Mr. DINGELL. The Chair will observe that that kind of statement usually is much more helpful to the subcommittee than one which has been cleared by the Bureau of the Budget. This is all the more pleasing to the Chair.

Mr. McLAREN. I suspect that, with sufficient time, it would be cleared in any event.

Mr. DINGELL. I am sure with sufficient time the Bureau of the Budget would have tried to water it down.

Mr. McLAREN. I understand, Mr. Chairman, that the committee is interested particularly in mergers, certain distribution problems, and proposals for changes in the Robinson-Patman Act.

I will go into each of these three subjects, but first, if I may, I would like to comment on our antitrust activities as they relate to small business.

Although not charged with the specific function of protecting small business firms, the Antitrust Division's efforts to foster competition do serve to promote opportunities for small businesses. In fact, such firms, along with consumers, are probably the principal indirect beneficiaries of our enforcement program.

For example, vigorous prosecution of such market restraints as price fixing, market allocations, the practice of reciprocity, tie-in contracts, and restraints on distribution opens up the market and afford small businessmen the opportunity to compete on the merits of their products or services. Similarly, monopolization cases and merger cases seek to prevent the development of undue economic power which could have an adverse effect upon the ability of small entrepreneurs to enter a new field or exploit market innovations. Indeed, such power could even foreclose them from the market.

A vigorous small business community has traditionally played an important role in the American economy. Our history is replete with examples of small firms which have expanded rapidly due to their ability to meet unsatisfied consumer demands. Our economy has frequently been the beneficiary of new ideas, both in the form of better products and improved management and marketing techniques, which had their genesis in small business firms. As a result, we are constantly aware of the desirability, indeed the necessity, of preserving competitive opportunities for small business.

Referring now to mergers, our recent enforcement efforts in this area have been the subject of a great deal of public comment, and I think that, for this reason, merger policy is an appropriate starting point for a discussion of the relationship between specific areas of antitrust enforcement and small business. Horizontal mergers—mergers between direct competitors—may have a number of anticompetitive effects:

- (1) They may eliminate a significant amount of direct competition between competitors;
- (2) They may cause significant increases in concentration in a market or foster a trend toward concentration;
- (3) They may enhance the dominant position of a market leader; or
- (4) They may lessen the possibility of eventual deconcentration in an already concentrated market.

Accordingly, lawsuits aimed at blocking horizontal mergers which may significantly lessen competition are designed to have the effect of preserving competitive opportunities for small and larger businesses to compete—to buy as well as to sell—free of the dominance of a single firm or a small group of firms. As an example, some of our smaller bank merger cases are designed to preserve competitive borrowing alternatives for small businesses.

Certain vertical mergers—mergers between firms which are in a supplier-customer relationship to each other—also raise the threat of significantly lessening competition. For example, acquisition of a customer by a supplier may foreclose access to either or both parties, thereby reducing, *pro tanto*, the ability of nonintegrated firms to compete. Such acquisitions also may increase the risk of a price or supply squeeze on smaller competitors of the integrated firm or on new entrants.

The most controversial area of our merger enforcement policy relates to conglomerate mergers—those mergers which are neither horizontal nor vertical. In filing cases against conglomerate mergers, the Department has relied upon concepts of potential competition, reciprocity and reciprocity effect, entrenchment, and merger trend, which have been articulated in recent Supreme Court decisions. The relationship between our enforcement efforts in this area and the interests of small businesses can best be understood by a brief examination of the concepts of reciprocity effect and entrenchment.

A reciprocity agreement is one in which company A agrees that it will buy from company B if company B buys from it. In our opinion such agreements clearly violate the Sherman Act if a not insubstantial amount of commerce is involved and if it is a systematic practice. The term "reciprocity effect," however, refers to the fact that companies often unilaterally determine that it would be in their best interests to purchase from companies which are, in turn, in a position to purchase from them. In view of this tendency, mergers which enhance the ability of leading firms to benefit from this reciprocal dealing effect place single-line or less-diversified companies, which do not need products produced by their customers, at a competitive disadvantage with respect to their larger and more diversified competitors. Mergers which significantly facilitate the likelihood that businesses will deal with each other on a reciprocal basis threaten to distort our competitive system, which requires that business decisions be made on the basis of price and quality. In attempting to block mergers which significantly increase the danger of reciprocal dealing, the Department is seeking to preserve the opportunity for all firms to compete, irrespective of their size or degree of diversification.

Turning to the entrenchment theory, when a leading firm in an industry is acquired by a firm that is disproportionately larger than

most of the competitors in the acquired firm's market, there may be a danger that the merger will serve to entrench the leading firm's position in that industry. Such mergers may significantly increase barriers to entry for smaller firms who may be disinclined to challenge the aggregate power of a conglomerate leader. Here, too, our efforts to block mergers which may result in the entrenchment of a leading firm are designed to foster competitive opportunities for all firms, irrespective of their size.

Now, as to distribution, this is another area in which antitrust enforcement serves the interests of small business. In many cases the balance of bargaining power between a manufacturer or supplier and its distributors is weighted heavily in favor of the former. Recent decisions of the Supreme Court, however, indicate that antitrust should play a significant role in limiting the power of manufacturers and suppliers to restrict the activities of their distributors.

Thus, in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court held that, when a manufacturer has given up title and dominion over its product and business risks have shifted to the distributor, the manufacturer may not restrict either the territory within which or the customers to whom the distributor may resell the manufacturer's product. Even when the parties have entered into what is legally a consignment agreement, the Court has held in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) that a supplier may not, through the use of a coercive consignment contract, deprive its distributors of the right to set retail prices.

Similarly, agreements between suppliers and third parties which result in coercion against distributors to carry a particular brand or which were held to be inherently coercive have been struck down by the Supreme Court. In *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965), there was evidence of pressure of this type on retailers. More recently, in *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968) the Supreme Court held that a similar commission arrangement between a petroleum company and a tire manufacturer violated section 5, even though the Court found no evidence of explicit coercion.

Upon reviewing these cases, it appears to us that they contain a recurring theme. The Court seems to have said that powerful franchisors may not emasculate the decisionmaking powers of independent businessmen, who bear the risk of success or failure of their distribution businesses.

A practice about which some small businesses have expressed concern is commonly known as dual distribution. Dual distribution describes the situation where a manufacturer distributes partially through its own outlets and partially through independent firms. The Department of Justice does not regard dual distribution as a distinct antitrust problem. As a form of vertical integration, it seems to us that the competitive effects of dual distribution depend upon the circumstances of each particular case. There are circumstances in which a manufacturer's attempts to engage in dual distribution may very well violate the antitrust laws. For example, a manufacturer's attempt to acquire significant distribution outlets may violate section 7 of the Clayton Act if the acquisitions may substantially lessen competition. Moreover, attempts by partially integrated manufacturers to engage

in predatory pricing, that is, pricing designed to drive competitor-distributors from the market, are subject to challenge as an attempt to monopolize in contravention of section 2 of the Sherman Act. And the *Schwinn* decision mentioned before makes it clear that a manufacturer may not reserve certain customers to itself by restricting the customers to whom its distributors may sell.

The important thing to be kept in mind with respect to dual distribution is that we would hate to see the law used to freeze any particular form of distribution into a certain pattern, thereby stifling any future attempts by manufacturers or suppliers to improve the efficiency of their operations. Since dual distribution practices may provide competitive benefits as well as competitive harm, we must be careful to avoid adopting overly broad rules and must examine such cases upon their individual facts.

Mr. DINGELL. Mr. McLaren, the Chair notes with some regret that the two lights that you see up above the clock and the two buzzers that you heard recently indicate a vote going on on the floor on a matter of some importance to the present occupant of the chair, and it will be necessary, therefore, for me to break at this time. If I do so, I can vote almost immediately on arrival at the floor and return most punctually. It will require a recess of the committee of perhaps 10 or 15 or maybe 20 minutes at the most.

Mr. McLAREN. We are at the pleasure of the Chair.

Mr. DINGELL. I humbly apologize. You will note this is not an intentional courtesy at all.

Then the subcommittee will stand adjourned at the call of the Chair for a period of approximately 10 to 20 minutes.

(Recess.)

Mr. DINGELL. The subcommittee will come to order.

Mr. McLaren, the committee thanks you for your patience and we are happy to recognize you again for such statement as you choose to give.

Mr. McLAREN. Thank you, Mr. Chairman. I would like to turn now to the question of the Robinson-Patman Act.

It seems to us that proper enforcement of the Robinson-Patman Act is a matter of vital concern to the small businessmen of our Nation. The act was enacted in 1936 primarily to protect small businessmen from devastating competition from their larger competitors who used their greater purchasing power to obtain significant price advantages unjustified by cost savings and not available to smaller enterprises. In other words, the act was designed to protect both small business and competition, not to shield small business from competition.

The basic problem with the act, however, is that it is an uneasy attempt to serve two potentially conflicting goals:

1. The enhancement of competition; and

2. The protection of smaller firms from price favoritism—direct or indirect—to their larger competitors. The first is an antitrust goal; the second a social policy goal based more on certain concepts of equity than economics. Unfortunately, enforcement of the act has at times stressed the second goal to the exclusion of the first, and disregarded the necessity for the reconciliation of the goals mandated by the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953). It is to be hoped that the Federal Trade

Commission under its new leadership will be able to reorient its Robinson-Patman enforcement policy in a direction more consonant with the promotion of vigorous price competition.¹

Ultimately, the crucial issue is whether price discrimination which causes no measurable harm to competition should be lawful or unlawful. In this regard, a balance must be struck between the interest of small businessmen in preventing price differentials favoring their competitors and the consumers' interest in the promotion of robust price competition. For reasons to be discussed somewhat later in my prepared text, price discrimination, which incidentally is simply a price difference as, for example, from one market to another market, can in certain fairly common situations be the only way that competition can be injected into certain oligopolistic markets. In such cases, price discrimination may facilitate the breakdown of an oligopolistic price structure or allow de novo entry into a regional oligopoly. An outright prohibition of price discrimination whenever it caused diversion of business from the unfavored to the favored competitors could have a substantial chilling effect on the willingness of sellers to engage in competitive pricing. The Commission has recognized this in its stated view that price discrimination is not illegal per se. This is spelled out, for example, in *Lloyd A. Fry Roofing Co.* [1965-1967 Transfer Binder] Trade Reg. Rep. par. 17, 303, at 22, 436 (FTC 1965).

We feel that the emphasis should be put on the promotion of competition, in view of the techniques available to small businesses by which they can pool their buying power to obtain price advantages similar to those enjoyed legitimately by their larger competitors.²

The Commission's enforcement of the Robinson-Patman Act in recent years appears subject to criticism in at least three specific areas: (1) the determination of the competitive injury required for a violation under section 2(a) (15 U.S.C. section 13(a) (1964)); (2) its administration of the "meeting competition" defense contained in section 2(b) (15 U.S.C. section 13(b) (1964)); and (3) its administration of the "cost-justification" defense contained in the proviso to Section 2(a). In our view, interpretation of the law should be shifted to favor more vigorous price competition in these areas. That is to say: (1) In determining "effect on competition," greater care should be taken to be sure that the effect of a challenged discrimination threatens the vigor of competition, rather than the profits of a few competitors. (2) In evaluating "meeting competition" and "cost justification" evidence, more liberal standards should be applied.

There is perhaps less that the Commission can do about changing its enforcement policy where Sections 2(c), 2(d) and 2(e) of the act are concerned. These sections simply represent a statutory pattern quite difficult to justify in logic or experience, that is, they involve absolute prohibitions on certain practices regardless of the competitive harm—if any—they may cause. Nevertheless, it seems to us that the

¹ The criticisms contained the report of the American Bar Association Commission To Study the Federal Trade Commission indicate that such a reorientation would be most timely. See also *Food Fair Stores, Inc.*, 3 Trade Reg. Rep. sec. 18,850 (FTC 1969) (Commissioner Elman dissenting); Elman, "The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal," 42 Wash. L. Rev. 1 (1966).

² See *Central Retailer-Owned Grocers, Inc. v. Federal Trade Commission*, 319 F. 2d 410 (7th Cir. 1963).

Commission should, and it can, review these sections with an eye to modern marketing realities.

Now, Mr. Chairman, the balance of my paper discusses specifically the problems of proving injury to competition and the defenses of meeting competition and cost justification.

If it is satisfactory to the chairman, I will be glad to leave that for the prepared paper. I would just like to add that it seems to me in the latter two areas, that is, acceptance of cost justification proof and acceptance of meeting competition proof that there has been a liberalized trend in the Federal Trade Commission in the past few years. It is in our view a healthy trend. It is one that can be and I hope will be continued. It is for this reason that we urge that the various amendments suggested by different task forces and other groups should be considered by the Commission, because I do not think that it is necessarily true that the law needs amendment by Congress in order to bring it into line and make it a much more useful procompetitive law.

Mr. DINGELL. Mr. McLaren, without objection the balance of your statement has already been inserted in the record.

The Chair wishes to direct to you, if I may, one question, and that is you indicate that FTC should consider amendment of the act. You don't mean really that they should consider amendatory action. They should change their interpretation.

Mr. McLAREN. That is what I intended to say.

Mr. DINGELL. A matter of semantics that we have here.

Mr. McLAREN. I put it poorly, I am afraid, but that was the thrust of what I meant. I think the Commission can, and it should, reinterpret the act, to take into account whether competition is really affected or whether they are merely protecting some individual competitors or the profits of those competitors.

Mr. DINGELL. You are saying this in the light of the language of the statute that you read above? Is it that? You had alluded previously to one of the statutes here.

Mr. McLAREN. Yes. It is a matter of reconciling the Robinson-Patman Act with our fundamental national economic policy—competition.

Mr. DINGELL. The Chair will have other questions but the Chair—let me ask, does this complete your presentation?

Mr. McLAREN. Yes, Mr. Chairman.

Mr. DINGELL. Then the Chair will recognize Mr. Potvin, counsel of the subcommittee, for such questions as he may choose to ask.

Mr. POTVIN. Mr. Chairman—General McLaren, on the last page of your statement, page 29, in paragraph No. 4, you espouse "liberalizing the specific and absolute prohibition presently contained in 2(e), 2(d), and 2(e)." You go on with some more explanatory—rather more specific language. These, of course, are per se sections.

Mr. McLAREN. Yes.

Mr. POTVIN. Thus, what you espouse is that an administrative agency in effect amend legislation?

Mr. McLAREN. No. I think that in fact the Commission has in the past amended the law by eliminating some things from consideration. I am sorry I don't have a copy of the act here, but it runs in my mind that in one of the sections, perhaps both in 2(d) and 2(e), the Commis-

sion has read out of the act an exception for value received. They just ignored it for many years.

I think that under section 2(e), for example, a very good case can be made that the modern broker salesman who represents a smaller manufacturer typically provides services comparable to those of the large manufacturers who have their own field sales forces. To the extent that these men go out and do shelf work, rotating of products and that sort of thing in grocery stores, the Commission's interpretation of 2(e) prohibits this. This to me is 1930's thinking in terms of marketing of those days. There is a lot that the Commission can do within the proper framework of that act to reinterpret it in the light of modern conditions and our basic fundamental economic policy of competition.

Mr. PORVIN. I think you speak to a rather basic point here, though, sir. You go on to say "Payments currently prohibited by those sections"—(c), (d), and (e)—"would be tested for anticompetitive effect under the revised standards recommended for all," your underlining, "instances of price discrimination." That is to say 2(a). And when you say that the same test should be for the *per se* section test for 2(a), then it is hard to conceive that you are not espousing administrative amendment, sir.

Mr. McLAREN. I don't think so in the light of the overall plan of the statute and the legislative history and the intention of the statute.

Mr. DINGELL. Mr. McLaren, the Chair would like to interrupt at this point to ask isn't the settled judicial interpretation of the statute rather inconsistent with that position, though?

Mr. McLAREN. Well, I think that the judicial interpretation of the statute has been to an extent more stringent than I would like to see it. It has been a matter of upholding FTC interpretations under the very broad discretion that the act gives to the Commission. We are saying to the Commission that we think it ought to exercise its discretion in terms of 1970 marketing, not 1935 marketing.

Mr. DINGELL. Of course, in legal theory the FTC has discretion in finding fact.

Mr. McLAREN. Yes.

Mr. DINGELL. In theory I think they have no discretion in terms of interpretation of law. In other words, the law is the law and if you are a strict constructionist in the law and believe in stare decisis, and so forth, it necessarily follows that the interpretation of the law once settled by the court is for all intents and purposes settled.

We get some differences of opinion whether the courts apply this doctrine any more but at least in theory this is so. Am I correct?

Mr. McLAREN. I think that is correct, but I also think that when you are considering something as undefined as substantial effect on competition, there is a great deal of room for flexibility of interpretation.

Mr. DINGELL. Aren't you really suggesting, though, that rather than a question of interpretation of law that the Federal Trade Commission change its interpretation of fact? Isn't that really what you are suggesting?

Mr. McLAREN. I am suggesting they take a new approach to their administration of the law.

Mr. DINGELL. You see, they can determine which cases they are going to bring. Obviously, there is fairly broad discretion in this area.

Obviously, they have some judgment in their fact finding although we would hope they would in all instances given a similar fact pattern come to the same conclusion. But again, in terms of interpretation of the law, they really have no discretion or perhaps maybe I may view this matter of judgment with regard to administrative body carrying out the will of Congress differently than you do.

Mr. McLAREN. The Commission has the discretion to make the determination of what evidence is sufficient to establish, in its view, an adverse effect on competition sufficient to trigger the statute.

Mr. DINGELL. A matter of finding fact.

Mr. McLAREN. A matter of finding fact and concluding as to the application of the law—both.

Mr. DINGELL. I don't really think you can say there is a difference in conclusion as to law. Once they make the finding of fact in theory they should interpret in light of the—

Mr. McLAREN. The conclusion follows.

Mr. DINGELL. In view of the very settled pattern of law that happens to exist.

Mr. McLAREN. I think that, in this whole field of economic regulation, you have mixed questions of law and fact.

Mr. POTVIN. Mr. Chairman, I submit, though, that once they have gone on that case and they find that there is conduct that is violative of 2(d) or 2(e), and if you are saying that they must also find substantial injury to competition, that, sir, is simply amendatory to the legislation which imposes no such test.

Now, if you are saying that they can file in this or that case, then that, of course, is another matter.

Mr. McLAREN. They can determine that a 2(d) charge is in fact a matter of price discrimination and does not have sufficiently adverse effect on competition. That is one very simple way of doing it.

Mr. DINGELL. General McLaren, I just must recess the subcommittee—will you accept my apologies—for a very brief period.

Mr. McLAREN. Surely.

Mr. DINGELL. The subcommittee will stand in recess for a couple of minutes.

(Recess.)

Mr. DINGELL. The subcommittee will come to order. With due and appropriate apologies to Mr. McLaren, the Chair reconvenes. I am sorry, Mr. McLaren. I do apologize for the recess.

Mr. McLAREN. That is quite all right, sir.

I had made, I think, one part of my answer to Mr. Potvin's question on a hypothetical 2(d) allowance and he was saying that, if the allowance is there and not proportionalized, the Commission has no alternative but to find a violation. I was suggesting that there are perhaps two ways around this.

If, in fact, the allowance does not appear to the Commission to be actionable, it could regard it—and indeed it is sometimes almost impossible to tell the difference—as a price discrimination rather than a 2(d) allowance, or it could find that perhaps the allowance was substantially proportional to all customers and as to that part that was not, it was de minimis.

So, I think there is a great flexibility for the Commission to do something to bring the act up to date within its present framework.

Mr. POTVIN. I was not trying to suggest they should be fully mechanical about this, but I think in terms of the Congress' prerogatives here, that if you start adding tests to per se sections, that it is—

Mr. DINGELL. They are not per se sections any more.

Mr. POTVIN. No, sir.

Mr. WERTHEIMER. Mr. Chairman, may I just comment?

Mr. DINGELL. Certainly.

Mr. WERTHEIMER. Does not that flexibility come up in the initial stage when the FTC has to determine what cases it is going to bring and in so determining, is not it important, assuming that they cannot bring all the cases that come before them, for them to try to determine to bring the cases which will have the most benefit in terms of maintaining continuing competition?

Mr. McLAREN. That is certainly true, too.

Mr. POTVIN. Well, Mr. McLaren, now, you of course, have concurrent jurisdiction with the Commission in these matters.

Mr. McLAREN. Yes.

Mr. POTVIN. In fact, section 15 of the Clayton Act states that your agency shall.

Further, we have a number of cases which, when they finally wend their tortuous way up to the Solicitor General's office, at that point you, in effect, are asked to intervene in terms of, the word that comes to mind is approving, although that is not a word of art, their appeal and to recommend to the Solicitor General whether he should prosecute the appeal. Is that not correct?

Mr. McLAREN. Yes.

Mr. POTVIN. Well, now—and historically the Department has not infrequently been unsympathetic with the prosecution of the appeal of FTC matters.

Now, why is it, sir, since you can intervene at an earlier time, you would not do so? We are talking about a very long record, very long, very expensive, inordinately so in some cases, you know 7 years is not infrequent, and since if it is a matter that the Department is in disagreement with, would there not be a public and administrative plus, perhaps, in having intervened under your direction in section 15 either ab initio or in the early stages of the proceedings rather than through your recommendation to the Solicitor General in the latter stages?

Mr. McLAREN. That raises a very good point. I think part of the answer is that there may be no disagreement on the theory of the complaint when it is first brought. Frequently things change over a period of time. By the time a case comes out of the Commission on appeal to the court of appeals, the sufficiency of the evidence may by that time be the crucial question.

We are then presented with a rather different question. I suppose the basic answer is that until a case is finally crystallized for Supreme Court decision, there is not the time nor the staff to focus on it. It would require having duplicate staffs on these cases.

Mr. POTVIN. Well, you already have enough to do. I do not mean to be critical in that respect. Let us be specific. You criticized the National Dairy jams and jellies case.

Mr. McLAREN. You understand I am disqualified on that case.

Mr. POTVIN. Yes; but here is a good hypothetical. I am choosing it since obviously in your official capacity you are not involved.

I think that your tenure as a private practitioner, as president of the ABA antitrust section is just as important a portion of your testimony as your official capacity here today, so with all deference to that very high office—the members of the Commission when they were here, I think, in essence said sure, a national distributor or one that is strong in a number of regions, but want to crack a new region, is going to lower its price.

The question is, When does that practice or when does the promotion become a practice?

They then point to the multimillion dollars of markdown that they regarded as discrimination and the damage on the small independent manufacturers in the area who were losing customers.

On the other hand, say it is a result likely to discourage de novo entry into regional markets. So here—this is not a matter of viewing the record with a feeling that it perhaps is a—the evidence is insufficient, and so forth. Not the technical aspects but really the warp, the woof, and the theory of the case you disagree with.

Now, when that is true from the ground up, when the FTC begins to go in one of these areas that you rather precisely set forth in your statement here, does not the Department really perhaps have a duty to go over there and intervene rather than waiting until the last chapter and then pouncing on it?

Mr. McLAREN. Well, it is a little embarrassing to discuss that case, so let us take another example.

Mr. POTVIN. There are many, of course.

Mr. DINGELL. Well, perhaps we could, and I recognize in fairness to your requirements, Mr. Attorney General, we do do this, but in fairness, just to take this in the abstract, would it not be fair to say that the Department does have a responsibility to make a determination on this matter at a time earlier than when the matter finally does head for the courts? Would that not be a fair statement?

Mr. McLAREN. Well, I really think that it is difficult, because until the case does come out of the court of appeals, you do not really know what its parameters are.

Going back to this *National Dairy* example, there are actually three closely related counts in that case. One of them involved something called Marshmallow Cream and an introductory offer of 30 days up in Boston. There the company gave away one free case with each two purchased as an introductory offer. The evidence went in, and the Commission found in favor of the company on it.

There was the second count that went somewhat similarly and also was decided in favor of the company.

The key to the jelly count was that the Commission found—from rather odd evidence, it seems to me, and again I say I am prejudiced—a predatory intent.

Now, until the seventh circuit's decision, you could not know whether this was going to stand up or not. If the seventh circuit had found there was not any predatory intent, there would be no occasion for the Antitrust Division to get into it.

Mr. POTVIN. Let us assume the following.

Mr. McLAREN. We do not disagree, you see, on the theory. If there was predatory intent, just speaking of the law now, the Commission's order was proper.

Mr. PORVIN. Well, OK: what about this situation? The Commission or at least a majority of it sitting at that witness table during the last few days stated that they felt that (d) and (e) were indeed *per se* statutes and while some of the members, I think, shaded over into either agreeing or tending to agree with your position here today, it is clear that the majority of the five votes did not.

Thus, the Commission by virtue of that vote would, one presumes, go one way on a given question and if you had your druthers you would go the other.

Well, you in fact have the power to do that. There are great unresolved issues here simply because there is "a regrettable lack of empirical data," and this is a phrase that the Chairman here has heard, oh, 104 times or some such by now.

I submit, sir, that one way of providing some empirical data of the benefits as you believe or the liabilities as others believe that might flow from a different kind of enforcement could very well be resolved by the Department of Justice by taking it and enforcing it according to your lights. Is that not correct?

Mr. McLAREN. In other words, I take it you are saying that the Commission and the Department of Justice should also be active under our concurrent jurisdiction as we both are active under section 7 of the Clayton Act.

Mr. PORVIN. I would not presume to make that judgment, sir, but my point is that a certain theory of enforcement not having been tried, there is indeed a lack of empirical data. You have the power to undertake such enforcement. This presumably would result—it would in fact produce results which when measured, as the Chairman just noted, would produce data.

Mr. McLAREN. Yes, well, certainly it is something to be thought about.

Mr. DINGELL. Am I not correct, too, Mr. McLaren, in coming to the conclusion that you have an agreement with the Federal Trade Commission with regard to who will enforce which aspects now of the legislation we are discussing? Does not this give you a measure of discretion to enter into and to help determine the course of action in and by the Federal Trade Commission with regard to this matter through the opportunity to essentially negotiate agreements with them on this point?

Mr. McLAREN. Basically, the rule is that we refer Robinson-Patman matters to the Commission, except for criminal matters under section 3, unless otherwise agreed. Perhaps that should be given further thought and perhaps reconsidered.

Mr. DINGELL. Aren't I, though, fair in coming to the conclusion—if I am in error on this, and this is a point with regard to your appearance today that is very, very troublesome to me and I think now as one who has tried a fair number of lawsuits in my own day—are I fair in coming to the conclusion, though, that once the law is settled, that we ought to proceed to enforce it quite forcefully and forthrightly and if the courts establish policy that appears to be unwise, should it not be that your agency would be before the Congress to suggest a change in policy?

Is this not really the proper theoretical fashion in which this matter should be handled? We should not seek, and I am sure you will

agree with me on this, that the regulatory agencies will fudge their interpretations of a major antitrust statute to conform with the shifting attitudes of the antitrust bar or change in administration?

Mr. McLAREN. With the greatest respect, I think that I tend to disagree with you on that, Mr. Chairman. The antitrust laws are drafted with a breadth that is somewhat comparable to constitutional provisions. The conditions we face and the work that is to be done by the antitrust laws changes as business changes occur. It seems to me that the agencies should change with the times and enforce the law as they believe it was intended to be enforced.

Mr. DINGELL. Let me then try and simplify this because we seem to be getting down to what I regard as a very novel interpretation of law and that is are you telling this subcommittee that it is your belief that the interpretation of the law should shift with the times?

Mr. McLAREN. Yes; I think that is correct.

Mr. DINGELL. Well, now, let us come down—would it be fair, then, to say that the laws—the interpretation of what constitutes murder should shift with the times of riot or civil disobedience or disorder or price fixing? I find this a very quaint doctrine. Not quaint. I think the term would be more appropriately extraordinary.

Mr. McLAREN. Well, I think there are always unsettled areas of the law and—

Mr. DINGELL. I have always believed the law to be immutable until changed. Now—

Mr. McLAREN. One of the things that changes, Mr. Chairman, are the cases that are brought before the courts.

Mr. DINGELL. I have no difficulty with interpretation of the law. If somebody—rather, I have no difference with interpretation of facts but when you tell me that we should change the interpretation of the statute, then I begin to become extremely uncomfortable because it means that a fellow who does one thing at one time may be found guilty of a major criminal violation whereas a fellow who does it 6 weeks or 6 years later might be found innocent, or vice versa.

Mr. McLAREN. Well—

Mr. DINGELL. This troubles me greatly.

Mr. McLAREN. I certainly see what you mean and I do not know that the reinterpretation extends quite so far as you might suggest.

Mr. DINGELL. I want to be fair with you but once—believe me, it is the last intention that I have today that you should in any way be embarrassed or that I should in any way entrap you, but I do become extremely apprehensive when different persons, similarly situated, should be treated differently under the law. This to me, it seems to me, is a fundamental unfairness of the greatest magnitude and something that I also understood Anglo-Saxon principles of fair play were intended to obviate.

Mr. McLAREN. Again and again bring cases are brought, before the Supreme Court, and it is argued that here is a line of cases and they might have some application, and here is another line of cases and they might have some application, but if they have application, they are out of tune with the times. They were probably badly decided in the first place and, therefore, the court ought to overrule them.

Mr. DINGELL. The Chair wants to yield to Mr. Potvin.

Mr. POTVIN. It seemed to me as I was listening, Mr. Chairman, Mr. McLaren, to the colloquy between the two of you that perhaps the

matter might be resolved in this manner, that there is a different situation with respect to, say, price fixing than there might be to a non-per-se kind of violation.

Certainly you are eminently correct when you say the Sherman Act is an example, notably semiconstitutional in nature, yet when you get to the very specific things, many are somewhat abiding in nature, a boycott, the prohibition on price fixing, that sort of thing, I think it was perhaps to the latter that the Chairman spoke whereas you were speaking of the broader aspects of the topic.

Mr. McLAREN. Well, the Chairman's example, of course, what is murder 1 day was not 2 weeks ago. I do not mean anything like that at all, of course. But I think if you examine some of the recent cases under the Sherman Act, for example, the recent container case, there is a concept of price fixing there that—although corporate counsel I suspect worried about it maybe 10 years ago—nobody seriously said 10 years ago that that was price fixing. But when the case was presented to the Supreme Court, it said, yes that is price fixing.

Mr. POTVIN. And many of us certainly welcomed the increment added by the *Perkins* decision as an example which sharply changed the insights in certain price and distribution problems.

Mr. McLAREN. I think that the conglomerate merger field is another perfect example. My predecessors in this office, for example, felt that the purer types of conglomerate merger, no matter how large the companies involved, were not reached by section 7 of the Clayton Act. I disagree with their interpretation of the law and ultimately it comes to the court to decide it, not to counsel.

Mr. DINGELL. Of course, once the courts have decided, that then becomes the law. Am I correct? I keep wanting to get back to this point because some of the things you have said, Mr. Attorney General, very much trouble me.

Mr. McLAREN. Well, it certainly becomes the law for that particular case and *stare decisis* is certainly a well-established doctrine. But 20 years from now, other circumstances, other times, and other conditions may very well move a government prosecuting agency to bring cases asking for a somewhat different interpretation of the law.

Mr. POTVIN. Mr. McLaren, you certainly have done a most articulate job of advocating, as was to be expected, the position of the Department of Justice. It is traditional. It is customary, and you have been unusually eloquent in that respect. Certainly, it would have been altogether shocking had you taken any other position.

Mr. McLAREN. Thank you very much.

Mr. POTVIN. I am not one of those that subscribe, incidentally, sir, to the proposition that there is an identifiable and separate entity known as the Sherman Act mentality.

Sir, one of the broad questions that faces, I suspect, all small businessmen at all times is the need for forging countervailing power. It was said some years ago by Commissioner Lowell Mason in the *Grocery Distributors Association of Northern California* case, at FTC, that grousing, he noted, is a good old American custom. The day when businessmen cannot get together to grouse will be the day when there will be no private business to grouse about.

Now, frequently grousing is a function of price, unfortunately, and that is where the problem begins. If a number of small independent

distributors of this or that commodity in their trade association convention assembled or whatever, they would like very much to talk to their supplier and say, hey, the trouble with you is that you are charging too much for your tires, your gasoline, or whatever.

Now, this presents problems, yet it would seem that it would be a helpful thing if you could cast any light at all in this troubled corner of darkness.

To what extent can they, as a group, confront their supplier and say we think you are charging too much?

Mr. McLAREN. Of course, in the agricultural area there is a specific exemption for cooperative groups. In the area of competitors getting together to present a united front to a governmental body, you have in effect a first amendment constitutional guarantee. But when you simply put a group of competitors together, we will say, in a trade association—and I emphasize that there are many proper areas of activity for trade associations—to the extent that they combine either on the buying or the selling side, you have a very serious question of antitrust liability.

Mr. POTVIN. But they are not always competitors—what if you have the local widget dealers for a certain manufacturer from all over the country together, thus there would be—I cannot say with certainty, of course, that there would be an absolute lack of competition. There would at least tend to be no competitors.

Mr. McLAREN. Perhaps franchisees.

Mr. POTVIN. Yes, perhaps franchisees. Would that alter the situation, sir?

Mr. McLAREN. I would have to give that some thought. I think that if it was a matter of their getting together and threatening boycott—

Mr. POTVIN. Yes, certainly they cannot boycott.

Mr. McLAREN. Do you see what I mean? They say to the supplier if you do not give us what we want, we are going to fix your wagon. I think then you have got a clear violation.

Mr. POTVIN. They are certainly dead if they do that.

Further, it cannot be used as a launching pad for price fixing. So much is clear.

Mr. McLAREN. I question whether it would be proper for them to try to bargain jointly for prices, for example, from the supplier.

Mr. POTVIN. What about a full free and frank discussion? We think you are charging too much and here are nine reasons why, whereupon the supplier, one assumes, would come back and say, nonsense, we are charging the least we can and here are 10 reasons why.

Is this sort of interchange in your view, proper?

Mr. McLAREN. I would want to think about that—

Mr. POTVIN. In fairness—

Mr. McLAREN (continuing). Not just answer it off the cuff.

Mr. POTVIN. I attempted to alert you a bit on this by discussing it with your very able colleague, Bruce Wilson, last week but in fairness certainly, you should feel most free, I should think, to take such of your time and that of your staff in reflection as you feel the question warrants, submit it within such time as the Chair may direct.

Mr. McLAREN. My problem is that I can see dangers in it. I do not know how to express the guidelines exactly on just where the division might be between what would be a proper interchange of information

and what might be considered to be in effect a threatened boycott or unwarranted exercise of joint power.

Mr. POTVIN. Certainly we are not seeking to have you extend carte blanche here. The reports in the complaints we get, sir, are this, that individual small businessmen do not deal with their suppliers at a level where meaningful conversations can be held when they are together because of—I think the usual word is the scary nature of this question. They usually are told by their counsel, you may not discuss price at all. And this is a frustrating and they would say sterile type of situation.

So the question is: Is there any give there at all that would be in your opinion, proper? If you can enlighten us later we would be grateful.

Mr. McLAREN. Certainly their counsel is taking the conservative line and the cautious line. How do you answer the question of why is it not just as effective for these people to contact the supplier individually? I suppose the answer is they want to do it together because they are stronger. Why do they need to be stronger? Are they putting the pressure on him and, if so, at what point does this raise an antitrust violation?

I think you have to know the specific facts in each instance. I just would not want to give you an off-the-cuff answer.

Mr. DINGELL. This is a very sticky problem because if they get together and agree that they are all going to contact him about the price, they may again be raising antitrust questions. Is this not also true?

Mr. McLAREN. I do not suppose that the mere decision to contact the supplier would violate the antitrust laws. But how can you carry out that contact without it involving some sort of a combination of power?

Mr. DINGELL. And once you do that, you almost certainly have an antitrust question.

Mr. McLAREN. You certainly have a certain amount of risk. And it is not necessarily the risk from the Department of Justice or the Federal Trade Commission. Increasingly as I am sure you know, it is a question of a private antitrust suit. It is how the lawyer for that supplier regards this. If he thinks that his client has been unfairly dealt with by this group, he might file an antitrust case against them for an attempted boycott.

Mr. POTVIN. Mr. McLaren, the chairman has instructed me to request from you the final document, be it agreement or a court order, in each of the major petroleum mergers during the last decade, from 1960 on. As I understand, the BP-Sohio matter has now reached a point where this, too, might be properly included.

Mr. McLAREN. Yes. The decree was entered in *BP-Sohio* early in November and became final right at the end of the year.¹

Mr. POTVIN. Now, in terms of the mergers, and they are most difficult for you, I know, both in terms of absorbing staff and time, and also the complexities of the issues, but I would like to discuss with you the degree to which small independent distributors are entitled to consideration.

I have before me a letter,¹ which will be supplied you upon leaving from an individual in Pennsylvania, formerly a similar jobber, who

¹ See p. A200 at end of volume.

was apparently in an overlap area between Sinclair and Atlantic Richfield which made him BP. Now, he is in the overlap area between BP and Sohio, and in the interim he has gone out and convinced everybody in town that BP is going to be just wonderful and they all signed up with him, and now he is told, no, the Justice Department said you can't be BP.

Sohio won't let him be Sohio, so he is going to be Sohio's fighting brand, Fleetwing, thus in a sense being demoted from being a major name brand to a minor fighting brand.

Well, do you feel that there is any possibility that this kind of problem—I don't mean to single him out—is deserving of more attention in solving these extremely difficult overlap problems?

Mr. McLAREN. That gets into really a question of how the defendant carries out the decree after it is entered. Generally speaking, our decrees are in broad terms with certain prohibitions and guidelines. I suppose it would require some sort of an appeal machinery or something like that for individuals that are affected. Even then, it seems to me that we would be getting too much into the running of the individual company's business.

Mr. POTVIN. Of course, the sequence of the BP entry and absorbing the overlap from Sinclair-Atlantic Richfield and then merging with Sohio, I think, is unprecedented in that industry, at least, is it not?

Mr. McLAREN. It may well be.

Mr. POTVIN. But certainly the mechanical problems are considerable, but would you not agree in general terms that in approving or disapproving a merger, the impact upon independent distributors is clearly one of the factors that you do look at?

Mr. McLAREN. Oh, yes. We look at the impact on the distributors at the very outset in bringing the case. We consider the impact on them to the extent that it is possible to do so. In the case of these dimensions, I believe that the final decree requires Sohio to divest itself of stations handling 400 million gallons of gasoline a year. This is, I think, probably in the nature of 2,000 stations. For us to try to deal with the individual situation of people in 2,000 stations would be quite an undertaking.

Mr. POTVIN. Well, with the understanding that the letter is not to be regarded as a plea for individual relief, but as indicative of a category of problems, may we submit it to you for your comment?

Mr. McLAREN. I would be happy to have it.

Mr. POTVIN. Thank you, sir.

Recently, during these hearings, a concerned citizen in his individual capacity, a Mr. Stewart W. Pierce of Richmond, Va., appeared and testified on the one-price system in the tobacco industry, the so-called freight allowed or f.o.b. origin, freight prepaid system, which cigarettes are sold at the same price to wholesalers in California and in New Jersey, and so forth.

Mr. McLAREN. I am not familiar with that situation specifically. I know that type of system.

Mr. POTVIN. Well, as you know, this is sort of the remains, as it were, of some very major antitrust activities back in the late forties. I would like, without taking the time of yourself and the chairman here and now, to submit to you this transcript with a request that you

have the appropriate member of your staff study it and particularly address himself to the specific allegations made by Mr. Pierce, and you might also recall that just a year ago today, in fact, the most recent story in the Washington area appeared, an exchange of letters between yourself and Chairman Dingell on this point.

At that time you had your staff look into it in a general kind of way and they responded that they saw no necessity to proceed.

It is our hope, of course, that Mr. Pierce's very excellent analysis will give renewed or perhaps even additional insight to your staff and that they will reverse their decision.

Mr. McLaren. We will be glad to review it.

Mr. Potvin. Mr. Chairman, I would like at this time to submit for the record a letter written by Mr. McLaren, dated April 2, 1969, to Dr. A. V. Astin, Director of the National Bureau of Standards, which was provided by Mr. McLaren's staff last week.

Mr. Dingell. Without objection, the document referred to will appear in the record at this point.

(The document above-referred to, follows:)

APRIL 2, 1969.

Dr. A. V. Astin,
*Director, National Bureau of Standards, Department of Commerce,
Washington, D.C.*

DEAR DR. ASTIN: I have your letter of December 18, 1968, requesting the views of this Department on a proposed revision to the American Lumber Standards for Softwood Lumber (SPR 16-53).

In general, we believe that the proposed revision represents a significant improvement over the prior standard. Thus, the proposal relates standard dimensions to moisture content; it prescribes review of, and incorporates by reference, certain criteria for the formulation of detailed standards by the rules-writing agencies; it provides for an independent Board of Review; and it establishes a National Grading Rule Committee to formulate standards for dimension lumber. These changes do not appear to present any antitrust problem; and, in fact, they should tend to improve lumber standards from the competitive standpoint.

The implementation of the proposed standard, however, particularly in connection with the grouping of species and assignment of strength and stiffness values, could give rise to competitive problems. In that connection, as you are aware, the Antitrust Division has for some time been conducting an investigation into various aspects of the lumber industry, including matters involved in lumber standards making, which has not yet been completed. We discuss such potential adverse competitive effects in more detail below, so that the Bureau of Standards may consider them in its implementation of the proposed standard, and in connection with possible subsequent revisions.

A. DIMENSIONS

With one exception, we have had no question about the proposed schedule of lumber thickness and widths corresponding to nominal sizes. The schedule establishes a differential between green and dry lumber which appears to resolve a longstanding industry problem on adequate technical grounds. In other respects, insofar as lumber producers and consumers are concerned, one set of dimensions does not appear to be intrinsically preferable to another. While theoretically smaller dimensions might disqualify certain nominal sizes of weaker wood species from use in existing standard lengths, we have not seen any evidence that such effects may be anticipated.

It had been suggested to us, however, that reduction in the 4-inch nominal dimension of 2 x 4 lumber from $3\frac{1}{8}''$ to $3\frac{1}{2}''$ may adversely affect competitive relations among manufacturers of other building materials. It has been said, for example, that although both copper and hubless cast-iron pipe will fit within a $3\frac{1}{8}''$ wall, only copper pipe will fit within a $3\frac{1}{2}''$ wall. If this were so, the proposed standard would subject producers of cast-iron pipe to an unwarranted disadvantage. On the other hand, it appears that the prior standard, by permitting the use of $3\frac{1}{8}''$ green lumber, actually resulted in walls at least as thin as

under the proposed standard. To that extent, since the minimum possible thickness is the critical fact, the proposed change in the standard dimension would not have any competitive effect.

We understand from your staff that this matter has been considered by the Bureau and the American Lumber Standards Committee along with the affected industries, and that it was concluded that the proposed changes would not change the competitive situations in the building materials industry.

B. WORKING STRESS AND STIFFNESS VALUES

Section 5.3.1 of the proposed standard provides that values for working stress and module of elasticity (or stiffness) contained in grading rules "shall be developed in accordance with appropriate ASTM standards and other technically sound criteria". It also states that the Bureau of Standards, assisted by the U.S. Forest Products Laboratory is to be "the final authority as to the appropriateness of such standards or criteria", and that the Board of Review of the American Lumber Standards Committee is to review grading rules, and to use the assistance of the Forest Products Laboratory in reviewing the working stress and stiffness values set forth in such rules.

These provisions are in general terms and emphasize the importance of "technically sound criteria". As such, they do not in themselves raise competitive problems. They are an improvement over the prior standard in spelling out public-interest supervision over the criteria for grading rules by the Bureau and the United States Forest Products Laboratory. However, our investigation does suggest that there may be problems in the implementation of these provisions, which should be considered by the Bureau.

The principal problem relates to the grouping of species of lumber and the related assignment of average strength or stiffness values to the groupings. Section 5.3.1 contemplates that this would be done by the rules-writing agencies subject to review by the Board of Review, in turn subject to the influence of the U.S. Forest Products Laboratory and of ASTM standards and criteria, the latter being ultimately reviewed by the Bureau of Standards. We recognize that there are benefits to both producer and consumer in reducing the number of separately-identified categories of wood which are produced and sold; and so long as the groupings consist of wood with similar properties, there is a convenience and no adverse effect in marketing them under a common name and with a representation of common properties. On the other hand, to the extent disparate species are grouped together, especially if they originate in different parts of the country and tend to be sold in different areas, the grouping may result in an incorrect or misleading representation. The grouping may also have adverse competitive effects to the extent that it distorts the advantages or disadvantages which producers of different species would have as a result of the actual differences among their products.

We recognize that Section 5.3.1 incorporates by reference ASTM standards, which contain explicit guidelines on groupings of species and assignment of average values. And we understand that such incorporation rests upon a determination by the U. S. Forest Products Laboratory that, in their present form, the ASTM standards are technically proper and in the public interest. In view of the competitive effects of these groupings, however, we emphasize the importance of continued surveillance by the Bureau and the Forest Products Laboratory in the light of improved technical information and other developments, and the taking of action to require changes in the ASTM criteria, when necessary. At some future time, the Bureau might consider directly providing the major substantive guidelines in SPR 16-53, which could, for example, require that the physical properties of all species grouped together for the purpose of averaging strength and stiffness values must lie within a specified and limited percentage range.

The proposed standard provides that, under the above criteria, the formulation of actual product standards—the so-called "grading rules"—will continue to be carried out by rules-writing bodies. The existing rules-writing bodies are producer organizations, and do not necessarily follow principles of standards making which ensure adequate representation and consideration of all relevant interests, including the various producer, consumer and public interests. To deal with this situation, the proposed standard directs the rules-writing bodies to follow ASTM and other "technically sound criteria", and to make available upon request explanation of the means by which claimed values were derived (Section 5.3.1) : it provides for review of rules by an independent Board of Review and the U. S.

Forest Products Laboratory (Sections 5.3.1, 9.4-9.5); and it provides that rules for so-called "dimension" lumber which includes the principal sizes used in residential construction, shall be developed by a new rules-writing body to be established, the National Grading Rules Committee (Section 10.4).

We have considered whether to recommend that the proposed standard should go further, and should require that grading rules (and revisions in such rules) should generally be submitted to the Department of Commerce as proposed voluntary product standards. We understand that this alternative position was also considered by your staff. And we accept the Bureau's view that your Department's standards-making procedures would not now be appropriate, because of the multiplicity of lumber standards and the need for flexibility in modifying them. We suggest that this question might be reconsidered at some time in the future.

As noted, the standard establishes a National Grading Rule Committee to take over the function of developing standards for dimension lumber. Specific provision is made for representation in that Committee of public bodies, consumer organizations, professional groups, etc. We commend this proposal, in the belief that adequate representation of divergent interests should improve the quality of standards making, and minimize the possibility of anticompetitive consequences. This provision, however, raises the question whether the various regional rules-writing bodies, which will continue to develop rules for "boards" and "timbers", everything but dimension lumber, should not also be required to provide procedure for broad participation, and expression of views, in their rules-writing activities. In noting our approval of the change in the proposed standard with respect to the National Grading Rules Committee, we suggest that in future revisions the Bureau should consider adopting procedural and membership criteria applicable to the other rules-writing agencies.

C. BOARD OF REVIEW

The proposed standard places considerable emphasis on the role of the Board of Review in assuring that the grading rules, or product standards, are developed in the public interest. We commend the provision for an independent board, whose members may not be members of the American Lumber Standards Committee (as they are at the present time), or affiliated with a grading agency or with an agency member (Section 9.1). At the same time, two of the three Board members will be nominated by rules-writing or inspection agencies. We believe that the Bureau should consider whether additional provisions may be required to assure independence of the Board; and we suggest that the standard could be improved by requiring the concurrence of the Secretary of Commerce in the designation or removal of Board members.

In addition, while grading rules require the prior approval of the Board of Review, Section 9.4(c) provides that revisions in such rules developed by the various agencies will take effect unless objected to within 60 days by the Board. While there may be a need for flexibility and expeditious handling in certain situations, we question the desirability of a procedure in which the burden is placed upon the Board rather than upon the proponents of revisions in the rules. The Bureau should consider whether to modify Section 9.4(c) in order to provide for prior Board approval of revisions.

We note that Section 9.7 provides that the "facilities of the Board of Review shall be available" to all lumber inspection agencies on fair and nondiscriminatory terms. We assume that this provision was intended only to avoid discrimination among agencies, and that it does not limit the Board from dealing with complaints, inquiries and recommendations from other persons. The Board should not be so limited, and, if necessary, the standard should make this clear.

I hope these comments are of assistance to you. We would be pleased to discuss them further.

Sincerely yours,

RICHARD W. McLAREN,
Assistant Attorney General, Antitrust Division.

MR. POTVIN. This letter, as you well know, Mr. McLaren, was an analysis by your—by the Antitrust Division of the competitive, or perhaps I should more properly say anticompetitive implications of a certain proposed softwood lumber standard. A recent issue of Random

Lengths, a trade publication, carried a graph showing the price differentials for the years 1964 through the first half of 1969 between three species of western softwood, western hemlock, white fir, and white spruce.

Mr. McLaren, in essence, what this shows is that over time there is something like a 15- or 16-price differential between hemlock and white fir because of the difference in the characteristics of the wood—the strength, the stiffness—but also in addition to those usual values, such varied aspects as the ability to hold nails and acting as a bearing in prefabricated trusses.

Now, as you know, the most controversial application of the new lumber standard is on the so-called grouping of species which will be, in effect, mandatory. Now, if I market hemlock and my competitor is marketing white fir, cuts it over the hill from me, I am forced to lose my identity into a common designation such as hem-fir, thereby giving up my market acceptance and my \$15 or \$16 price advantage.

This is, I take it, clearly in restraint of trade.

The question is, is it unreasonably in restraint of trade, and that is my question to you, sir.

Mr. McLaren. Well, as I understand, and I am certainly no expert in the lumber industry, over the years the classification of different woods under common classifications or standards has been a continuing problem. I can certainly sympathize with the fellow that has a wood of somewhat better characteristics that might normally give him a little bit of a premium, we will say, over someone having another type of wood. I believe that we mentioned this problem in our letter and took the position that this common classification for different woods would not be an improper thing provided that the spread between the characteristics of the different lumbers or trees wasn't too great. And—

Mr. Potvin. Now, in your—

Mr. McLaren (continuing). If it were, I can see that it could involve, certainly, an unfair situation. Whether or not it would be an antitrust question—considering the participation of the Department of Commerce, and so on, in attempting to establish standards—is, of course, a difficult question.

Mr. Potvin. Well now, you have chosen as your criterion the difference in the various technical characteristics of the lumber—the strength, the stiffness, and so forth.

Now, what would be the basis for choosing that over the market price established over a very long track record? That is to say, if I am selling on this chart hemlock, I have been consistently getting a substantially higher price. Of course, if this was a voluntary group, there would be obviously no problem, I take it, other than a possible deceptive practice problem.

Mr. McLaren. A voluntary group getting together to establish a standard, if it is a standard that can't be reached, for example, by some segments of the industry or that has some ulterior purpose, can be reached under the antitrust laws, but I think all these things would be for consideration in establishing the standard and whether or not your spread is too great. In other words, price would be a factor to be considered.

Mr. Potvin. And are you saying, then, too, that if there were unrealistic and unattainable by substantial portions of the industry, say,

moisture content levels, that if they could not be reached, that this, too, would be a factor that you would feel would contribute toward—

Mr. McLAREN. I would assume so, but again, I am not a lumber expert.

Mr. POTVIN. Well, would this be a proper way to proceed?

Tomorrow the subcommittee will be receiving very extensive testimony on the subject. Would it be proper to—if the chairman will certify that record down to you, with the request that it be studied and have your comments back concerning the presence or absence of anti-trust implications or violations?

Mr. McLAREN. Well, we will be happy to study the record. I don't know whether we could really give an opinion on it without really getting into it with experts, and educating ourselves on the situation.

Mr. POTVIN. Well, these are matters on which you have already expressed some level of concern in your letter to Dr. Astin.

Mr. McLAREN. Yes. I understand—correct me if I am wrong—that there are a number of things that are still open on this matter. The standard has not gone into effect.

Mr. POTVIN. The standard has been promulgated. Its effective date was moved from March 1 to September 1. So, indeed, the question of how it shall be implemented in terms of rules or grading, there are open areas.

Mr. McLAREN. I think that one of the things we indicated in our letter was that this is a very significant and very complex subject. A lot of what we have been told is hypothetical, and we would like to see what happens in practice, not being experts.

Mr. POTVIN. Well, we shall have some very mundane practical matters in our transcript tomorrow, I can assure you.

I have no further questions.

Mr. DINGELL. Mr. Oden.

Mr. ODEN. Mr. Attorney General, another subcommittee of this committee is presently involved in an investigation of the credit card industry in this country, and I would like to address to you one of the questions that we have been asking banking institutions in this country.

In our questionnaire we asked the bank whether their contracts with a merchant contained any provision precluding a merchant from granting a discount on a noncredit card sale. Two responses have been received indicating that they do indeed have a clause in their contract prohibiting a merchant from granting a noncredit card discount on a sale.

Mr. McLAREN. Well, that is a new matter to me. I hadn't heard of that.

Mr. ODEN. I hope that when the subcommittee receives all the information from the various banks we have contacted, which were over 50—picked geographically all over the United States on a random basis—that we can send the Department some of these answers and copies of these contracts.

Mr. McLAREN. We would be very interested to see them.

Mr. ODEN. No further questions.

Mr. DINGELL. I think that tends to show, Mr. Attorney General, that in your line of work we learn something new every single day.

Mr. McLAREN. We find that is so and that is what makes it a most fascinating area of the law.

Mr. DINGELL. Mr. Wertheimer.

Mr. WERTHEIMER. No questions.

Mr. DINGELL. Mr. Attorney General, the Chair is troubled about a couple of things. We have a situation in the Federal Trade Commission and, indeed, in most of our Federal regulatory agencies, where cases go on for years and years. In the case of the Federal Communications Commission, the Chair is aware of cases that date from the middle 1930's that are still active.

In the case of the Federal Trade Commission, the standard period that we have heard is 7 years for successful conclusions upon termination of sundry and different court reviews.

ICC cases last for a long time. Do you have some comments on the procedural aspect of these cases, and perhaps maybe some guidance for the subcommittee as to what could be done with regard to improving procedures inside the regulatory agencies to afford more expeditious determination and justice for the parties?

Mr. McLAREN. Well, I certainly recognize it, Mr. Chairman, as a problem in these cases that do seem to hang on and on. Perhaps on a more cheerful note, I think that a great deal is made of a relatively few cases that do last an awfully long time. Very little attention is paid to the fact that a great many cases are settled by consent decree at the time that the complaint is filed.

We have had that experience ourselves, and I know one case that is in its 10th year. It has been up and down from district court to Supreme Court a number of times, and it just won't seem to wind up.

I think that a lot of work needs to be done and is being done in the field of administrative procedure. I understand now in the Federal Trade Commission that they are utilizing procedural rules a great deal closer to the Federal civil rules in the Federal district courts, and an effort is being made to expedite things.

Another thing that may be very helpful in the Federal Trade Commission is the preliminary injunction for certain types of activities.

Mr. DINGELL. You mean affording the FTC authority to issue temporary restraining orders?

Mr. McLAREN. No, to go into court for them. At the present time, they don't even have the right to go into court for them. This would put FTC on a par with the Justice Department. The Commission could determine in particular cases, primarily in the deceptive practices field where there are well established principles of law that there was a need for immediate relief and go into court for a preliminary injunction. We have proposed a bill along that line that is now pending in the Congress, as part of our consumer legislation, to give the FTC the same right that Justice has to go into Federal court and seek a preliminary injunction without going through the whole hearing procedure.

Mr. DINGELL. But isn't the procedure down there still unduly slow? Doesn't it—in any of the Federal regulatory agencies, hasn't the procedure now become a means for denying justice to a party who happens to be a litigant inside those agencies, either the Government or a businessman? Perhaps a defendant, perhaps a plaintiff.

Mr. McLAREN. Well, the Administrative Procedure Act was passed in order to get away from the arbitrariness of decisions by the ad-

ministrative agencies. But the result of that act, which required a notice and hearing, has been to slow things down, and I am afraid I just don't know an easy answer to that problem.

Mr. DINGELL. Don't we really need a thorough review of the procedures in all of the Federal regulatory agencies to arrive at a more expeditious fashion of determining these cases?

Mr. McLAREN. Certainly that result is needed. I am just not familiar with the extent the administrative conference is doing this.

Mr. DINGELL. The Chair is not aware either, so this perhaps is not a fair question for either one of us.

Mr. McLAREN. But it certainly is a badly needed improvement in the whole administrative area. I agree with the Chairman wholeheartedly.

Mr. DINGELL. When you have a major case that goes for 10 or 20 or 30 years, as they do now, don't we find ourselves in a position where whole generations of cases await conclusion by reason of this one case and that whole lines of cases, persons similarly situated, not infrequently are denied speedy and efficacious and satisfactory conclusion under the law by reason of waiting for the decision on one case.

Mr. McLAREN. That is certainly part of the result of such delay.

Mr. DINGELL. Now, this is one thing that troubles me. The other thing that troubles me about administration is the fact that the Congress never really fully appreciates the budgetary need and the policy of this and that administrative agency tends to fall under the administration as opposed to falling under the Congress, where in theory of law they properly belong, because budget—the Bureau of the Budget approves their process, procedures, questionnaires, passes upon their reports to the Congress, and matters of this kind.

As a result, it is very difficult for the Congress to apprehend what their real needs may happen to be.

Do you have some comment on this particular matter?

Mr. McLAREN. I really don't, Mr. Chairman. That is an area that is beyond my competence.

Mr. DINGELL. Well, the reason I queried you on these two points, Mr. McLaren, is that I very frankly am troubled about this. The reports which we have observed of panels that have studied the FTC deal not at all with the budgetary structure. They don't discuss, moreover, the fundamental problem of expeditious conclusion of cases which I regard as being a procedural one.

Let me ask you, in the light of absence of discussion in the different commission reports on this matter, how am I as a legislator to value the reports of these commissions? How am I to assume that they considered all of the aspects that should have been viewed by these agencies before they submitted a report?

Mr. McLAREN. I am afraid I just don't know the answer to that, sir.

Mr. DINGELL. You see, I am troubled. I think if it is—I told the story when the Chairman of the Federal Trade Commission was in here, about the three blind men who went down to look at the elephant. One came back and said it is like a snake. The second one came back and said, no, it is like an oak tree. And the third came back and said, no, it is like the side of an enormous barrel. And they all were more or less right. None of them had seen the elephant.

Had they all studied the elephant in full detail, they would have come back with a very different picture.

Here we have commissions that have gone down there and taken sundry looks, whether you are talking about Mr. Nader or talking about the Stigler or the Neal reports, or committees, they have all gone down there and looked at one aspect but they haven't looked at the question of procedure; nor have they viewed the question of budgetary structure, and the competence of the agency to carry out the law it has by reason of an adequate or inadequate budget.

Now, how am I to value the reports that have ignored anything as highly essential as the question of procedure or a question of budgetary adequacy?

Mr. McLAREN. I would assume that the appropriations committee to which the agency reported when they go up on their budget would have the power to look into that, but I really—

Mr. DINGELL. That is the appropriations committee, but the two commissions that have done this work have never viewed these questions. Aren't I in a position of having to feel that they have failed to look at some very essential aspects of the matter that they were charged to look into?

Mr. McLAREN. There is no question that the prompt accomplishment of their assigned functions is a major matter, but how you handle that, I am just not—

Mr. DINGELL. Of course, their budgetary competence to do the job, the amount of money they have. If they don't have enough money, aren't we to say questions involving other matters pale into very, very secondary significance? Isn't it a fair statement? In other words, if I were to take your agency, for example, and set up a bunch of task forces to review your comings and goings—sufficiency of your performance—and they didn't view the procedures under which you operated, the procedures under which you are compelled to operate in court, and they didn't take a look at your budgetary sustenance, wouldn't you be justified in saying they completely overlooked some very important problems that we have and that are very grave and aggravating to us?

Mr. McLAREN. Well, I expect that if that happened to me I would want to find a place to complain about it.

Mr. DINGELL. Well, the Chair directs that the record will remain open for a period of 30 days for such additional submissions as may be necessary by interested persons and, Mr. McLaren, permission is afforded you during such period to respond to the questions that remain yet to be answered because of the questions of Mr. Potvin.

The Chair also directs that all exhibits received will be reviewed by counsel as to whether or not they should be inserted in the record or retained in the files of the committee.

Any further business?

Mr. POTVIN. No, Mr. Chairman.

Mr. DINGELL. If there is no further business to come before the committee, the subcommittee expresses to you, Mr. McLaren, and to your valued associates there at the table with you, our thanks for your presence, our particular thanks for your patience, and our apologies for the inconveniences that have been visited upon you during your presence here.

Your testimony has been most helpful and we have been honored to have you, a most distinguished practitioner and most able public servant, before us.

We thank you.

(The complete prepared statement of Assistant Attorney General McLaren, above referred to, follows:)

STATEMENT OF RICHARD W. MCLAREN, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear and testify before you today. I think that you will agree that there is a significant parallel between your interest in fostering opportunities for small business and our mission to preserve the competitive character of the economy. I understand that certain areas of antitrust are of particular interest to the committee—mergers, certain distribution problems, and the Robinson-Patman Act, and I am prepared to discuss them with you. Before turning to these specific aspects of antitrust enforcement, however, I should like to make a few general remarks.

As you know, the Antitrust Division of the Department of Justice is charged with enforcing the Sherman Act, the Clayton Act and related antitrust laws. The purpose of these laws is to prohibit conspiracies to restrain trade or commerce, monopolies and attempts to monopolize, and a number of other practices, including mergers, which may have the effect of substantially lessening competition or tending to create a monopoly. We believe that the enforcement of these laws is necessary for the preservation of a free enterprise system which allows all businesses, be they small or large, to prosper and provide the consuming public with adequate choices as to the products and services which it desires.

It should be understood, however, that the Anti-trust Division is not charged with the responsibility of furnishing direct assistance to business firms, large or small, with respect to their business problems. That task is assigned to other Government agencies. The antitrust laws are broad and general. The Anti-trust Division is not directed to promote the business interests of any special class of business firms; instead it is charged with the responsibility of preserving the vigor of the competitive process itself. Thus, in determining the best manner in which we can discharge our function we must choose to apply our limited staff and appropriations in a manner which provides the greatest benefit for the competitive process as a whole.

While not charged with the function of protecting small business firms, the Antitrust Division's efforts to foster competition do serve to promote opportunities for small business firms. In fact, such firms are probably the principal indirect beneficiaries of our enforcement program. For example, vigorous prosecution of such market restraints as price-fixing, market allocations, the practice of reciprocity, tying contracts, and restraints on distribution, afford small businessmen the opportunity to compete on the merits of their products or services. Similarly, monopolization cases and merger cases seek to prevent the development of undue economic power which could have an adverse effect upon the ability of small entrepreneurs to enter a new field or exploit market innovations.

A vigorous small business community has traditionally played an important role in the American economy. Our history is replete with examples of small firms which have expanded rapidly due to their ability to meet unsatisfied consumer demands. Our economy has frequently been the beneficiary of new ideas, both in the form of better products and improved management and marketing techniques, which had their genesis in small business firms. As a result, we are constantly aware of the desirability, indeed the necessity, of preserving competitive opportunities for small business.

Our recent enforcement efforts with respect to mergers have been the subject of a great deal of public comment. Thus, I think that merger policy is an appropriate starting point for a discussion of the relationship between specific areas of antitrust enforcement and small business. Horizontal mergers (mergers between direct competitors) may have a number of anticompetitive effects: (1) they may eliminate a significant amount of direct competition between competitors; (2) they may cause significant increases in concentration in a market or foster a trend toward concentration; (3) they may enhance the dominant position of a market leader; or (4) they may lessen the possibility of eventual decon-

centration in an already concentrated market. Thus, lawsuits aimed at blocking horizontal mergers which may significantly lessen competition are designed to have the effect of preserving competitive opportunities for small and larger businesses to compete—to buy as well as to sell—free of the dominance of a single firm or a small group of firms. As an example, some of our smaller bank merger cases are designed to preserve competitive borrowing alternatives for smaller businesses.

Certain vertical merger (mergers between firms which are in a supplier-customer relationship to each other) also raise the threat of significantly lessening competition. Acquisition of a customer by a supplier may foreclose access to either or both parties, thereby reducing, *pro tanto*, the ability of nonintegrated firms to compete. Such acquisitions also may increase the risk of a price or supply squeeze on smaller competitors of the integrated firm, or new entrants.

The most controversial area of our merger enforcement policy relates to conglomerate mergers (those mergers which are neither horizontal nor vertical). In filing cases against conglomerate mergers, the Department has relied upon concepts of potential competition, reciprocity effect, entrenchment, and merger trend, which have been articulated in recent Supreme Court decisions. The relationship between our enforcement efforts in this area and the interests of small businesses can best be understood by a brief examination of the concepts of reciprocity effect and entrenchment.

A reciprocity agreement is one in which Company A agrees that it will buy from Company B if Company B buys from it. In our opinion such agreements clearly violate the Sherman Act if a not insubstantial amount of commerce is involved. The term "reciprocity effect," however, refers to the fact that companies often *unilaterally* determine that it would be in their best interests to purchase from companies which are, in turn, in a position to purchase from them. In view of this tendency on the part of firms, mergers which enhance the ability of leading firms to benefit from this reciprocal dealing effect place single-line or less-diversified companies, which do not need products produced by their customers, at a competitive disadvantage with respect to their larger and more-diversified competitors. Mergers which significantly facilitate the likelihood that businesses will deal with each other on a reciprocal basis threaten to distort our competitive system which requires that business decisions be made on the basis of price and quality. In attempting to block mergers which significantly increase the danger of reciprocal dealing, the Department is seeking to preserve the opportunity for all firms to compete on the basis of price and quality, irrespective of their size or degree of diversification.

When a leading firm in an industry is acquired by a firm that is disproportionately larger than most of the competitors in the acquired firm's market, there may be a danger that the merger will serve to entrench the leading firm's position in that industry. Such mergers increase the possibility of price leadership. They also may significantly increase barriers to entry for smaller firms who may be disinclined to challenge the aggregate power of a conglomerate leader. Here, too, our efforts to block mergers which may result in the entrenchment of a leading firm are designed to foster competitive opportunities for all firms, irrespective of their size.

* * * * *

Distribution is another area in which antitrust enforcement serves the interests of small business. In many cases the balance of bargaining power between a manufacturer or supplier and its distributors is weighted heavily in favor of the former. Recent decisions of the Supreme Court, however, indicate that antitrust can play a significant role in limiting the power of manufacturers and suppliers to restrict the activities of their distributors. Thus, in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court held that when a manufacturer has given up title and dominion over its product and business risks have shifted to the distributor, the manufacturer may not restrict either the territory within which or the customers to whom the distributor may resell the manufacturer's product. Even when the parties have entered into what is legally a consignment agreement, the Court has held that a supplier may not, through the use of a coercive consignment contract, deprive its distributors of the right to set retail prices. *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964). Moreover, it is now clear that a manufacturer may not, in combination with some of his distributors, impose either minimum or maximum resale prices upon the manufacturer's distributors. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *Albrecht v. Herald Co.*, 390 U.S. 145 (1960).

Agreements between suppliers and third parties which result in coercion against distributors or which were held to be inherently coercive have also been struck down by the Supreme Court. In *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357 (1965), the petroleum company had entered into an agreement with a major tire manufacturer pursuant to which the petroleum company was to receive a commission based upon the amount of the tire manufacturer's products which were sold through the petroleum company's outlets. On a record containing substantial evidence that the petroleum company had exerted coercive pressures upon its retailers to carry the tire manufacturer's brands, the Supreme Court upheld the Federal Trade Commission's decision that the commission arrangement constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. More recently, in *Federal Trade Commission v. Texaco, Inc.*, 393 U.S. 223 (1968), the Supreme Court held that a similar commission arrangement between a petroleum company and a tire manufacturer violated Section 5 even though the Court found no evidence of explicit coercion against the petroleum company's retailers. In so holding, the Court concluded that in view of the power which a major petroleum company has over its retailers, a sales commission system under which the petroleum company has a financial incentive to push the sales of a particular brand of automotive products through its retailers is inherently coercive.

Upon reviewing these cases, it appears to us that they contain a recurring theme. The Court seems to have said that powerful franchisors may not emasculate the decision-making powers of independent businessmen, who bear the risk of success or failure of their distribution businesses.

A practice about which some small businesses have expressed concern is commonly known as dual distribution. Dual distribution describes the situation where a manufacturer distributes partially through its own outlets and partially through independent firms. The Department of Justice does not regard dual distribution as a distinct antitrust problem. As a form of vertical integration, the competitive effects of dual distribution depend upon the circumstances of each particular case.

In our opinion, dual distribution is not, and should not be made, unlawful *per se*. By operating in this manner, manufacturers are often able to achieve significant economies which redound to the benefit of the consuming public. Moreover, in a free enterprise system, businessmen should remain free to alter their methods of distribution in accordance with the demands of changing economic circumstances. A manufacturer could decide to convert completely to a system of distributing through its own outlets without necessarily violating the antitrust laws, even though such a change would result in a loss of business to firms which had formerly acted as the manufacturer's distributors.

On the other hand, there are circumstances in which a manufacturer's attempts to engage in dual distribution may very well violate the antitrust laws. A manufacturer's attempt to acquire significant distribution outlets may violate Section 7 of the Clayton Act if the acquisitions may substantially lessen competition. Moreover, attempts by partially integrated manufacturers to engage in predatory pricing, *i.e.*, pricing designed to drive competitor-distributors from the market, are subject to challenge as an attempt to monopolize in contravention of Section 2 of the Sherman Act. And the *Schwinn* decision makes it clear that a manufacturer may not reserve certain customers to itself by restricting the customers to whom its distributors may sell.

The important thing to be kept in mind with respect to dual distribution is that we would hate to see the law used to freeze any particular form of distribution into a certain pattern, thereby stifling any future attempts by manufacturers or suppliers to improve the efficiency of their operations. Since dual distribution practices may provide competitive benefits as well as competitive harm, we must be careful to avoid adopting overly-broad rules and must examine such cases upon their individual facts.

* * * * *

The proper enforcement of the Robinson-Patman Act is another item of vital concern to the small businessmen of our Nation. The Act was enacted in 1936 primarily to protect small businessmen from devastating competition from their larger competitors who used their greater purchasing power to obtain significant price advantages not available to smaller enterprises. In other words, the Act was designed to protect both small business and competition, not to shield small business from competition. Fully aware of its great potential for creative and innov-

vative responses to changing consumer needs, the small business sector has never claimed a right to be protected from vigorous but fair competition, and the Congress has never granted it.

The basic problem with the Act, however, is that it is an uneasy attempt to serve two potentially conflicting goals: (1) the enhancement of competition and (2) the protection of smaller firms from price favoritism—direct or indirect—to their larger competitors. The first is an antitrust goal; the second a social policy goal based more on certain concepts of equity than economics. Unfortunately, enforcement of the Act has at times stressed the second goal to the exclusion of the first, and disregarded the necessity for the reconciliation of the goals mandated by the Supreme Court in *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953). It is to be hoped that the Federal Trade Commission under its new leadership will be able to reorient its Robinson-Patman enforcement policy in a direction more consonant with the promotion of vigorous price competition.¹

Ultimately, the crucial issue is whether price discrimination which causes no measurable harm to competition should be lawful or unlawful. In this regard, a balance must be struck between the interest of small businessmen in preventing price differentials favoring their competitors and the consumers' interest in the promotion of robust price competition. For reasons to be discussed more fully below, price discrimination can in certain fairly common situations be the only way that competition can be injected into certain oligopolistic markets. In such cases, price discrimination may facilitate the breakdown of an oligopolistic price structure or allow *de novo* entry into a regional oligopoly. An outright prohibition of price discrimination whenever it caused diversion of business from the unfavored to the favored competitors could have a substantial chilling effect on the willingness of sellers to engage in competitive pricing. The Commission has recognized this in its stated view that price discrimination is not illegal *per se*. *Lloyd A. Fry Roofing Co.* [1965-1967 Transfer Binder] Trade Reg. Rep. ¶ 17,303, at 22,436 (F.T.C. 1965). We feel that the emphasis should be put on the promotion of competition, in view of the techniques available to small businesses by which they can pool their buying power to obtain price advantages similar to those enjoyed by their larger competitors.²

The Commission's enforcement of the Robinson-Patman Act in recent years appears subject to criticism in at least three specific areas: (1) the determination of the competitive injury required for a violation under Section 2(a) (15 U.S.C. § 13(a) (1964)); (2) its administration of the "meeting competition" defense contained in Section 2(b) (15 U.S.C. § 13(b) (1964)); and (3) its administration of the "cost-justification" defense contained in the proviso to Section 2(a). Interpretation of the law should be shifted to favor more vigorous price competition in these areas. That is to say: (1) In determining "effect on competition," greater care should be taken to be sure that the effect may threaten the vigor of competition, rather than the profits of a few competitors. (2) In evaluating "meeting competition" and "cost-justification" evidence, more liberal standards should be applied.

There is less that the Commission can do about changing its enforcement policy where Sections 2(c), 2(d) and 2(e) (15 U.S.C. §§ 13(c)-(e) (1964)) are concerned. These sections simply represent a statutory pattern quite difficult to justify in logic or experience, i.e., absolute prohibitions on certain practices regardless of the competitive harm (if any) they cause.

A. REQUISITE INJURY TO COMPETITION

To repeat, the Robinson-Patman Act does not make all price discrimination illegal. It outlaws price discrimination only:

"* * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of such discrimination, or with customers of either of them. * * *" 15 U.S.C. § 13(a) (1964)

¹ The criticisms contained in the *Report of the American Bar Association Commission to Study the Federal Trade Commission* indicate that such a reorientation would be most timely. See also, Food Fair Stores, Inc., 3 Trade Reg. Rep. ¶ 18,850 (F.T.C. 1969) (Commissioner Elman dissenting); Elman, "The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal," 42 Wash. L. Rev. 1 (1966).

² See Central Retailer-Owned Grocers, Inc. v. Federal Trade Commission, 319 F. 2d 410 (7th Cir. 1963).

The requirement of some competitive injury was imposed so that a distinction would be made in the Act's enforcement between pro-competitive and anticompetitive kinds of price discrimination. Price discrimination can be essential for competition, where the lower price in one market is the first step in the breakdown of an oligopolistic price structure (where a general price reduction would be quickly matched), or where a firm from another area is attempting to gain a foothold in a market served by a regional oligopoly. But price discrimination can also destroy competition, as when it is used to drive out of business a key competitive force. Sorting out the destructive instances of price competition is not easy, but it is not impossible. The teaching of such cases as *Dean Milk Co. v. Federal Trade Commission*, 1968 Trade Cas. ¶72,393 (7th Cir. 1968) appears to be that a more thorough analysis of competitive harm is required before a violation of Section 2(a) can be found. Mere diversion of sales to the more competitive seller is not sufficient to establish primary line injury (*i.e.*, injury to competition at the level of the discriminator).

The Commission, on occasion, has had a tendency to bypass the kind of thoughtful competitive analysis the statute demands by finding "predatory intent" on the basis of dubious or inconclusive evidence.³ A recent example is *National Dairy Products Corp.*, 3 Trade Reg. Rep. ¶18,027 (F.T.C. 1967), *aff'd*, 412 F.2d 605 (7th Cir. 1969),⁴ where the Commission held that a successful promotional offer was motivated by predatory intent because, it found (1) no one had previously made a promotional offer of this kind (an unlimited quantity could be purchased during the 30-day sale period); (2) the product was not a new product; and (3) National Dairy should have anticipated the likely diversion of sales from its competitors because it had made a similar offer in a different market area.⁵ It is hard to imagine a result more likely to discourage *de novo* entry into regional markets, if the above factors are sufficient to establish predatory intent. The Commission should be urged to scrutinize claims of competitive injury from price discrimination more carefully in the future, so that only destructive varieties of price competition will be curbed.

B. THE COST JUSTIFICATION DEFENSE

Section 2(a) of the Act saves from illegality those price differentials which "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a) (1964). The cost justification defense is designed to permit passing on to customers any cost savings derived from the manner or quantities in which they are served, so that consumers may benefit and customers who can be served less expensively than others do not have to subsidize higher cost customers by paying the same price.

The benefits of the cost justification defense can be lost, and a private tax on efficiency can be imposed, however, if the Commission's requirements for establishing cost justification are so technical and stringent that normal businessmen cannot satisfy them. In *Federal Trade Commission v. Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir. 1967), the Court of Appeals for the Second Circuit invited the Commission to bring its expertise to bear on the problem of "defining practicable standards of customer classification for cost justification purposes which reconcile the objectives of the cost justification proviso and of the Robinson-Patman Act as a whole." 371 F.2d at 620. It appears that, of late, the Commission has made progress toward setting more workable and reasonable standards for allowable customer classification schemes, for allocation of costs to particular activities, and so on.⁶ Its continued progress in this regard will make the Robinson-Patman Act a pro-competitive, rather than the anticompetitive instrument it occasionally has been in the past.

³ In *Lloyd A. Fry Roofing Co. [1965-1967 Transfer Binder]* Trade Reg. Rep. ¶17,303 (F.T.C. 1965), *aff'd*, 1966 Trade Cas. ¶71,964 (7th Cir. 1967), the FTC held that close study of the market is not required to show competitive injury where the price discrimination is motivated by predatory intent.

⁴ In the interests of full disclosure, I should indicate that in private practice I represented National Dairy in this proceeding before the Commission and before the Seventh Circuit.

⁵ In affirming, the Seventh Circuit made no mention of the potential incompatibility between (1) and (3).

⁶ See *ABA Antitrust Developments* 1955-1968, pp. 133-35.

C. THE MEETING COMPETITION DEFENSE

Section 2(b) of the Act allows sellers charged with illegal price discrimination the affirmative defense that the price differential "was made in good faith to meet an equally low price of a competitor. . . ." 15 U.S.C. § 13(b) (1964). Regrettably, the Commission in the past has attempted to impose limitations on the availability of the defense that are inconsistent with the broader antitrust goal of the promotion of competition. For example, the Commission has held (1) that the "meeting competition" defense permitted only those price differentials designed to retain existing customers, not those intended to get new ones (reversed in *Sunshine Biscuits, Inc. v. Federal Trade Commission*, 306 F. 2d 48 (7th Cir. 1962)); (2) that a seller was not meeting competition in good faith unless prior to his price reduction he had proof positive of the exact offers he was meeting as well as the offerors' names (reversed in *Forster Manufacturing Co. v. Federal Trade Commission*, 335 F. 2d 47 (1st Cir. 1964)); and (3) that the use of a formal system of quantity discounts instead of individually tailored price cuts was inconsistent with "good faith" meeting of competition (reversed in *Callaway Mills Co. v. Federal Trade Commission*, 362 F. 2d 435 (5th Cir. 1966)). The more reasonable approach towards the meeting competition defense shown in *Beatrice Foods Co.*, 3 Trade Reg. Rep. ¶19,045 (F.T.C. 1969) is certainly a hopeful sign for the future.⁷

A great deal of the present conflict between the enforcement of the Act and the promotion of healthy competition, it appears, could be eliminated by a shift in the Commission's enforcement policies. The Commission has a broad discretion to develop rules and standards, to find facts, and to interpret the basic statute. In short, it has a great opportunity to achieve on its own the reconciliation between the goals of the antitrust laws and the seemingly conflicting objectives of the Act. Without legislation, it can take advantage of this opportunity to tighten the standards for competitive injury necessary to make out a violation of the Act, and to make the meeting competition and cost justification defenses more available in practice. It can use its administrative discretion to reinterpret §§ 2(c), 2(d), and 2(e) of the Act in terms of modern marketing conditions and techniques, and find violations only where a questioned practice has a meaningful effect upon competition. The Commission could implement this shift in enforcement policy in any of a number of ways—through decisions in new cases, the issuance of guidelines, or rulemaking proceedings—as it prefers.

The following proposals for amendment of the Act, contained in the White House Task Force Report on Antitrust Policy,⁸ and supported in principle by the Stigler Report,⁹ are worthy of careful consideration in this regard.

(1) Raising the standard of competitive harm required for a Robinson-Patman violation. Violations would require discriminations "substantial in amount," and either very likely to eliminate "from a line of commerce one or more competitors whose survival is significant to the maintenance of competition in that line of commerce," or "part of a pattern which systematically favors larger competitors over their smaller rivals * * *." (The Report would eliminate by statutory amendment present language forbidding discrimination tending to "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.")

(2) Allowing the "meeting competition" defense to apply to all "good faith" efforts to meet an equally low price quoted by competitors, even if the competitor's low price might itself be unlawful. Only prospective relief would be available if the initial low price which prompted other price cuts happened to be unlawful.

(3) Allowing price differentials which make an "appropriate" allowance for cost differences in serving different customers. (The statute forgives price discriminations making only "due allowance" for cost savings.) An allowance would be appropriate "where the difference in consideration does not substantially exceed the difference in cost; where the difference in consideration does not exceed a reasonable estimate of the difference in cost; or where the difference

⁷ See also *Beatrice Foods Co.* [1965-67 Transfer Binder] Trade Reg. Rep. ¶17,311 (F.T.C. 1965); *Ponca Wholesale Mercantile Co.* [1963-65 Transfer Binder] Trade Reg. Rep. ¶16,814 (F.T.C. 1964).

⁸ Hereafter referred to as the "Neal Report." BNA Antitrust & Trade Reg. Rep., No. 411, Special Supplement, Part II, May 27, 1969.

⁹ More formally known as the Report of the Task Force on Productivity and Competition, BNA Antitrust & Trade Reg. Rep., No. 413, June 10, 1969.

in consideration is the result of a reasonable system of classifying transactions which is based on characteristics affecting cost of manufacture, distribution, sale or delivery, under which differences in consideration between classes approximate differences in cost."

(4) Liberalizing the specific and absolute prohibitions presently contained in §§ 2(c), 2(d), and 2(e). Payments currently prohibited by those sections would be tested for anticompetitive effect under the revised standards recommended for all instances of price discrimination.

Mr. DINGELL. If there is no further business to come before the committee at this time, the subcommittee will stand adjourned until the call of the Chair.

(Whereupon, at 4:10 p.m., March 11, 1970, the subcommittee adjourned, to reconvene at the call of the Chair.)

(The following was subsequently ordered to be inserted in the record at this point:)

STATEMENT OF CLARENCE M. McMILLAN, EXECUTIVE VICE PRESIDENT
NATIONAL CANDY WHOLESALERS ASSOCIATION, INC.

My name is Clarence M. McMillan. I am Executive Vice President of the National Candy Wholesalers Association, Inc. This organization, formed in 1945, has an active membership of approximately 1250 wholesale distributors of confectionery and related lines including tobaccos. We have also approximately 250 associate manufacturer members who are largely suppliers of candy, chewing gum and other confectionery items. And we have approximately 750 associate traveling-men members who are the brokers and salesmen of the manufacturer suppliers.

All of the wholesaler members are known as independent distributors. All of them sell primarily to the independent retailer and provide him with services which he could not obtain generally if the wholesale distributor was eliminated from the economy. These independent distributors are responsible for the distribution of approximately half of the two billion dollars worth of confectionery sold at the retail level.

We believe that the independent retailer, the independent wholesaler, the small manufacturer, and the broker who represents most food manufacturers are an essential part of the American system of free enterprise. And we believe that the existence and enforcement of the Robinson-Patman Amendment to the Clayton Act has been essential to the survival of these independent operators during the past thirty-four years since the Robinson-Patman Act was passed.

We are always greatly concerned for the preservation of the Robinson-Patman Act in its present form. While granting there is need for strengthening the Act, we feel that the Federal Trade Commission and the courts have brought about an understanding of the law to the point that businessmen can now comply with it fully and that enforcement will serve to preserve and protect our free enterprise system of distribution.

Therefore, we were especially concerned when two 1968 Presidential task forces to study the anti-trust laws brought in recommendations that would virtually destroy the Robinson-Patman Act. We were particularly concerned with the report by the task force headed by Dean Phil C. Neal, which would eliminate sections 2(c), 2(d), 2(e), and weaken 2(f) and other sections.

We felt that our members were equally concerned, also. But we knew it would be impractical to bring even a small fraction of this group to Washington to appear before your Committee and certainly impossible for you to hear so many witnesses. Therefore, we undertook a national survey of our members on their attitude toward the Robinson-Patman Act in general and especially on the principal Robinson-Patman Act recommendations of the Neal Committee.

In presenting this subject to our members, we were very careful to avoid influencing their replies, as the attached questionnaire will show. (See the last two pages). We made no follow-up mailings to secure more returns. Thus, we feel that the number of responses received represent a true cross-section of the opinion of our membership.

A total of 62 wholesalers replied to the questionnaire, and of this number 57 said they did not favor the proposed changes in the Robinson-Patman Act and that they did not favor repealing the act. One wholesaler expressed opposition

to repeal, but indicated that certain changes were needed in order to strengthen it. The other four did not vote either way.

Of the 43 brokers and other manufacturers' representatives who replied, 41 voted both against repeal of the act and against the proposed changes. One did not vote but expressed the opinion that there was still as much need for the act as ever, while one voted against the proposed changes but voted for repeal of the act entirely, without giving any reasons why.

Of eight manufacturers replying to the questionnaire, seven voted against both repeal and the proposed changes, while one voted against repeal but suggested that certain changes were needed in order to strengthen the act.

WHOLESALE COMMENTS ON SECTION 2(C)

Wholesalers replying to the questionnaire commented on various aspects of the proposed changes in the Robinson-Patman Act, and some typical comments follow:

In regard to the commission's proposal to delete Section 2(c) of the act, Perry A. Kiritsy of the N. G. Gurnsey Co., Inc., Keene, N.H., declared: "If Section 2(c) of the Robinson-Patman Act were deleted from the present statute, unfair buying practices would immediately be started by the large volume buyers. This would put the small buyers at a competitive disadvantage."

On the same point, Raymond Covitz of the Bay State Tobacco Co., Worcester, Mass., said: "Every direct buyer would set up a buying organization and claim the brokerage commission. This would eliminate the broker unless the manufacturer were willing to pay a double commission. Without brokers, only standard items would be sold, thereby prohibiting further advancement of the candy industry. Every buyer requires services and should be willing to pay for them. The volume buyers want these services free while others pay for them."

Don Cresswell of Cresswell Wholesale Co., Casper, Wyo., stated: "The Wholesaler continually hears 'we buy direct at the same price you do' from the chain stores. If they get brokerage, this would change to 'we buy direct for less than you do.' This would shoot holes in the distribution system as we know it."

Ralph Schewe of the Merrill Candy Co., Merrill, Wis., declared: "The large chains would set up so-called buying organizations which would then receive the broker's commission and they would have a greater price advantage than they already have with their direct buying. Large buyers would ask for even greater concessions. All buying might become a negotiated transaction depending on how much the manufacturer is willing to give for a quantity purchase."

Elwin L. Pierson, Jr., manager of the candy division of Hayden Flour Mills, Tempe, Ariz., said: "I am opposed to the deletion of Section 2(c) of the Robinson-Patman Act because it would put the squeeze on the small wholesaler and could eliminate the broker."

Joseph R. Anderson of Anderson-Hayes Wholesale, Havre, Mont., stated: "The elimination of Section 2(c) would eliminate the broker as he would no longer have any of the volume accounts, and small wholesalers such as ourselves would be deprived of representation by manufacturers. We would also be priced out of the market because we would not be able to set up our own buying offices."

Discussing the same point, Sidney Brietbart of National Supply House Co., Aberdeen, Md., said: "The chain stores would use the brokerage fees to lower the price on candy in order to improve their competitive position even more than at present against the small retailers. A great number of small independent retailers would have to close their businesses. Eventually, the public would not gain, because the chain stores could and would coordinate their prices at a higher level after the independents were out of business. Furthermore, every wholesaler could set up a buying company which could then claim the brokerage fees. The brokerage firms would be out of business."

The whole situation on this point was summed up by H. Raymond Almy of Almy Brothers, Binghamton, N.Y., who said: "The manufacturer would be forced to pay brokerage to the large chain stores, to the discrimination of smaller retailers in competition with the chains. Brokers not collecting the brokerage could no longer afford to travel and would, in effect, be put out of business. Wholesalers not having brokers calling upon them would be at a disadvantage in not being presented up-to-the-minute items and ideas, while the chains would be shown items at their central buying offices, shown either by a principal of the manufacturer or a salaried salesman. Wholesalers then would not be able to suggest to small retailers items that they should have to make a profit to try to stay in business in competition with the giants. While in theory passing on brokerage to

the chains should be of advantage in price savings to consumers, it doesn't work that way, and in the long run probably would cost consumers more."

Another aspect is covered by Charles B. Bair of C. E. Bair & Sons, Inc., Harrisburg, Pa., who said: "If Section 2(c) were deleted, the sales force, as set up by the candy industry, would be hit the hardest because the salesman's commission would be dropped in order to compete. The salesman would not do the job of introducing new products and mentioning old products to keep both the new and the old products always before the public's eye and within easy reach of his hand."

A South Carolina wholesaler, who did not want his name used, declared: "I am not in favor of deleting Section 2(c). It would seem to me that the fact that large and small chains can buy from the manufacturers at the same price as the wholesaler is enough, and if allowed the brokerage fee, it would put the wholesalers and their customers, who can't buy direct, out of business. Also, the small wholesaler, if he could survive at all, would get very little, if any, consideration from the manufacturers' representative."

Arthur W. Marshall of the A. W. Marshall Co., Salt Lake City, Utah, said: "If Section 2(c) of the Robinson-Patman Act were repealed, large chains would put most of the smaller stores out of business. Large wholesalers would obtain brokerage fees which would give them a competitive edge over the small wholesaler and would put many small wholesalers out of business."

Duane Riedel of the Candy Service Co., Aberdeen, S.D., stated: "Deletion of Section 2(c) would create a hardship not only for the wholesalers but for the brokers as well, since they would be left out after getting an item started. The wholesaler and his retailers would be at a price disadvantage. Also, the wholesaler is serving a good cause by getting distribution and acceptance for new items, which large chains won't touch until they have become staple items through the work of the wholesaler."

W. W. Clark of the Clark Wholesale Confections, Greenville, S.C., summed up the point as follows: "The large chains would 'stick' the manufacturers for the broker's commission."

J. P. Fritz of the Fritz Company, Inc., Newport, Minn., declared: "If the brokerage prohibition were deleted from the Robinson-Patman Act, I believe it would destroy the confectionery brokerage industry and the distribution set-up as we have it today. My only defense would be to set up my own brokerage company, or form a corporation with other wholesalers to collect brokerage."

Arnold Gordon of Jack Gordon Tobacco Co., Inc., Syracuse, N.Y., stated: "Deletion of this section would give large buyers an advantage of anywhere from three percent to five percent which smaller users would not receive. In most cases, these large buyers are the ones who slice prices and could use this extra percentage to undercut competition."

Ron Waldron of Waldron Confectionery, Inc., Oak Park, Ill., declared: "Deletion of Section 2(c) would surely start a wave of brokerage set-ups by chains. The legitimate broker performs a necessary and valuable function. Some chains have gone into manufacturing, and this gives them advantages of supplying their own outlets. Let's not give the chains the best of everything."

Harold Wagner, Jr. of the Wagner Candy Co., Paducah, Ky., said: "If Section 2(c) were eliminated, after a period of time the brokerage fee would be given only to the largest wholesalers and the largest chain stores. It would tend to drive out competition. The brokerage fee might also be passed on in currency instead of off the invoice, thereby allowing the large buyer firms to get by without paying tax on this additional income, which in turn would put a higher tax burden on all of the people."

J. Anthony Puissegur, Candy Specialty Co., Crowley, La., declared: "If the brokerage clause is eliminated, the large buyer will be able to demand and receive many extra allowances from the manufacturer that will be called brokerage. The large buyer does not deserve these allowances, and this unfair situation discriminates against the small buyer. It would put the small buyer in an unfair situation. This would destroy the 'equality of opportunity in the marketplace' principle and would reduce competition."

A. G. Mason of the Mason Candy Co., Trinidad, Colo., said: "If Section 2(c) were deleted, it would tend to destroy many small businesses and brokerage firms. It would allow the chains to put the pressure on all manufacturers who supply them and eventually destroy some of the smaller businesses."

Max S. Bloom of S. Bloom, Inc., Chicago, Ill., said: "Deletion of this section would be detrimental to both the distributor and to accounts other than chain

and cooperative organizations. It would encourage direct buying from manufacturers due to receiving the brokerage fee."

Louis H. Wilhite of the Wilhite Tobacco Co., Miami, Fla.: "I believe the deletion of this section would create an unfair price situation. Our profit margin, as wholesalers, has constantly been shrinking, and with larger discounts to chains, which permit them to retail at the same, or only slightly above our cost, would tend to further depress the volume of business now being done by smaller independents, thus resulting in further shrinkage of business and profit for us."

James R. Dozier of the Washburn Cigar Co., Inc., Montgomery, Ala.: "In the event Section 2(c) is changed, it would mean an extra discount for the chain buyers and they would sell at a price we could not meet."

George A. Jones of Yankee Wholesale Co., Inc., Wiscasset, Me., said: "Deletion of Section 2(c) of the Robinson-Patman Act would provide an unfair price differential that would permit the giant chain organization to demand and receive what amounts to a discount for large purchases, rather than remuneration for a sales promotion and distribution service. Thus at the retail level the giant chain could offer an item to the trade at a lower retail price than the retailer who purchases through normal wholesale channels. This would encourage retail buying groups to merge to compete with legitimate wholesalers. These buying groups would perform only one or maybe two of the wholesalers' functions and receive the same discount unfairly. For his functional discount the wholesaler performs a great number of services in addition to the buying and distributing functions."

Bernard Hayhurst of Hayhurst Sales Co., Parkersburg, W. Va., said: "To delete this section would push the wholesaler closer to the end."

Pierre E. Chagnon, Meriden Candy & Tobacco Co., Inc., Meriden, Conn., said: "If this section were eliminated, the large buyer would deal directly with the manufacturer, and would ask and get the brokerage commission for himself. This would be a disadvantage to the small businessman."

William D. Royce of Sheehan Bros. & Hoben, Inc., Missoula, Mont.: "I am opposed to the deletion of this section, since it would definitely benefit the big money or large chain store buyers."

BROKER COMMENTS ON SECTION 2(c)

Brokers and other manufacturers' representatives were equally opposed to the deletion of Section 2(c) of the Robinson-Patman Act.

Jules D. Schwartz of the J. D. Schwartz Co., Wyncoate, Pa., pointed out the value of this provision of the law to small businessmen: "A definite unfair advantage would exist to the large accounts over medium and smaller accounts where factories give brokerage commission away. Also, it would spell the doom of the broker and would result in the passing of a vital function in the distribution picture in the candy industry."

R. W. Sproul of Jones-Sproul, Inc., Trumansburg, N.Y., said: "It seems obvious that this would be an instrument to allow the manufacturer to by-pass the broker and pay the commission directly to large chains or supermarkets, which in turn would allow these large accounts to either undersell their competitors or derive greater profits."

Elwood F. Countess of Elwood F. Countess Associates, Elliott City, Md., said: "If this section is deleted, it will definitely eliminate the brokers. Large chains would deal directly with the manufacturer and arrange for the broker's commission to come to them. Since this commission would give the chain accounts additional percentage to reflect in their prices, the small jobber and retailer would find it difficult to stay competitive and remain in business. Small business needs the Robinson-Patman Act more than ever in today's world to guarantee the right of free enterprise for them."

Herman Eitelberg, retired broker and now executive secretary of the National Confectionery Salesmen's Association of America, had this to say about the elimination of Section 2(c): "If this section were deleted, it would cause many hardships. Because there would be no broker in a territory to call on the customers there, it would be necessary to send a direct man from the company. It would also be equal to a rebate. In other words, the customer would be buying the merchandise for less than his competitors, and in that way, unjust competition would be caused."

Tom Gulick of the Tom Gulick Co., Dallas, Texas, said: "Every candy brokerage company in the country would be eliminated, as all major accounts would not allow a broker to call on them or sell them merchandise, as they would want the commissions whether or not they earned them. In my opinion, they

would do nothing to earn these commissions. Secondly, the small business organizations would be eliminated due to unfair pricing advantages afforded the larger companies by use of these commissions received."

F. A. Shinnamon of F. A. Shinnamon & Associates, Ellicott City, Md., stated: "Many chain stores would seek and most candy manufacturers would pay brokerage, virtually eliminating the broker from selling to chain stores."

Milt Harshe of Milt Harshe & Associates, Phoenix, Ariz., comments at length on the importance of Section 2(c): "I am against deleting this section from the act. Why should a large chain store be entitled to something they have not earned? They would not be willing to pay me for something I had not earned. The small brokerage fee I receive is paid to me because I have earned it. It would certainly make conditions for the small buyer just a little more difficult because he would be unable to meet prices of the larger organizations. I feel that I am worth more to the super chains than the three, four, or five percent fee that I receive. Our large candy companies have grown to their present size because of distribution. Advertising is essential, but 100 percent distribution in any given area is beneficial to everyone concerned. This can only be accomplished by having a broker salesman promoting the product, not by two or three large supermarket chains collecting the brokerage fee and running occasional ads. The small accounts would be at the mercy of the large chains as they would be unable to buy quantities to compete with prices of the super stores."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kansas, stated: "Deletion of this section would make it impossible for independent retailers to compete with the chain stores. It would not result in any lower consumer costs, because as soon as small retail competition is killed, the chains would adjust to higher prices."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., said: "Undoubtedly the large corporate chains would either form their own buying company or seek to exact the broker's commission by refusing to do business with a so-called middleman. This would not only adversely affect the broker, but the independent retailer as well because he could not exert the same influence on the manufacturer as could the corporate chain."

Jerry Hirsch of Lone Star Candy Brokerage Co., Houston, Texas, declared: "The elimination of Section 2(c) would eliminate the broker as he functions today. I had personal experience with a customer who set up his own brokerage firm with the result that any manufacturer who made an item similar to the one represented by this wholesaler was shut out of business with this account. If this could happen with a small customer in a small town, the impact on a large chain or other customer who had considerable leverage because of large volume is certainly pretty obvious. By closing the broker out of this area, vast damage would also be precipitated on the wholesaler who would not be able to compete in the market place at all since his customers would be in an uncompetitive position because the direct buyer with the brokerage arrangement would have the extra margin that the commission, now given to the broker, would be channeled into the corporate structure. The end result of this would ultimately result in the wholesaler being put out of business as well as all of the small independent retailers because of their inability to be competitive."

David L. Beecher of the Beecher Company, York, Pa., stated: "The only way the manufacturer could afford to allow the five percent brokerage fee is if the customer buys a substantial amount. He certainly is not going to allow an additional five percent for a small order. As a result, the small dealer cannot compete. Plus the fact, if the manufacturer eliminates the broker, his own business will suffer because he will lose all the smaller accounts."

C. J. Ferguson of Dehm & Co., Detroit, Mich., declared: "If this section were eliminated, there is no reason to believe that the recipient would render additional services. An unfair price advantage would be permitted. Companies would reflect the brokerage in the delivered cost of candy—nothing else. One large discount chain has already solicited manufacturers directly for this, simply to reduce the cost price and allow them to price lower than their competition."

James W. Allen, Jr., of Foote Brothers & Co., Norfolk, Va., stated: "The deletion of Section 2(c) of the Robinson-Patman Act would affect us greatly as brokers. There have been some buying groups that have been by-passing the law, and it has affected our gross income greatly, and with the deletion, it would be a great loss financially to us, and I urge that the law not be changed in any way."

MANUFACTURERS COMMENTS ON SECTION 2(c)

Comments from candy manufacturers on Section 2(c) were of the same general nature. A typical comment was that of D. O. Lynch of The Nestle Co., White Plains, N.Y., who said: "If buyers were not precluded from receiving the brokerage commission from the seller, many buyers would succeed in collecting such a commission by coloring or characterizing some of their activities as those of a broker. Some buyers, but not all, would then gain the advantage of a price lower than their competitors. Such a change would probably cause a substantial weakening of brokers who perform a useful function, but who would lose important revenue."

Richard S. Gates of the Charles N. Miller Co., Boston, Mass., said: "I believe that Sections 2(c), 2(d), and 2(e) of the Robinson-Patman Act should be retained in their present form. As a small business concern, I believe our best interests are more often protected by these sections of the act than hampered by them."

J. L. Kretchmer of the American Licorice Co., San Francisco, Calif., stated: "Giving a selling commission to a large buyer would give him an unfair advantage over the smaller firm. It would have the same effect as selling two competing customers at different prices."

Louis G. Shoemaker of the Palmer Candy Co., Sioux City, Iowa, stated: "It is our view, based on 30 years in the candy business, that the changes proposed would effectively remove any controls which the Robinson-Patman Act has over the buyer-seller relationship in this industry. These controls are the only things which the buyers for the volume confectionery retailers and wholesalers respect in their dealings with suppliers and their representatives. Removal of these controls would throw all the pressure of the volume buyer on the seller. We are satisfied that such conditions would leave the volume buyers with all of the advantages and the smaller buyer, retail or wholesale, would suffer severely, if they survived. The operations of all but the largest confectionery suppliers would also be seriously affected."

A. Vard Maxfield of Maxfield Candy Co., Salt Lake City, Utah, declared: "If this section were deleted, there would be nothing but chaos. There would be no way a manufacturer could work with a broker and keep him happy if all of the large chains and accounts could buy direct and receive the broker's discount. No protection whatsoever would be given to the small manufacturer. All of the big companies would swallow up the small ones. It has been small business that has made this country great. To maintain honesty and integrity in business we need this law on the books absolutely and positively."

Robert Jaret of Jaret Imports, Inc., Brooklyn, N.Y., stated: "The effect of deleting Section 2(c) of the Robinson-Patman Act would be to make the paying of a commission to the owner or buyer of large firms a standard procedure. This would not result in any savings to the consumer, but would work to the benefit of certain individuals or firms, over their small competitors. It would also create favoritism on the part of many buyers, for the sake of commissions, rather than for the price and quality of a product. While this does occur in an under-handed manner today in some instances, legalizing would make it so much more widespread and, therefore, so much more detrimental."

COMMENTS ON SECTION 2(d)

In regard to the proposal to eliminate Section 2(d), most of those replying to our questionnaire expressed views in opposition to any change.

Anthony J. Bonadio of Victor Bonadio, Inc., Danbury, Conn., said: "The small retailer could not compete. The seller would by-pass the small retailer in favor of large chains."

Erwin A. Michelson of Gilkin Brothers, Newark, N.J., said: "Elimination of this section would benefit only the large retailers and destroy the small independent competitors."

Carl F. Vonderhaar of Von's Supply Co., Little Falls, Minn., said: "If the manufacturer is interested in exposure of his products, it should be on a national basis and in all outlets and should be paid to anyone and everyone."

Perry A. Kiritsy of N. G. Gurnsey Co., Inc., Keene, N.H., said: "If Section 2(d) were eliminated from the Robinson-Patman Act, the large volume buyers would be given allowances for advertising and other services and facilities which could not be utilized by the small independent firms. If eliminated, it would be questionable if the allowances would be passed along to the consumer also."

Raymond Covitz of Bay State Tobacco Co., Worcester, Mass., stated: "The

buying practices would not necessarily change, and there is really no need to change. As it stands now, only the direct buyer with large volume finds it profitable to claim the allowances given."

Don Cresswell of Don Cresswell Wholesale, Inc., Casper, Wyo., stated: "As an ex-newspaperman, I am more familiar with advertising allowances in food and drugs than in candy. However, I know that if discrimination is allowed, discrimination will certainly exist."

Earl Eliseo of Maywood Candy Co., Maywood, Ill., states: "If Section 2(d) were eliminated, it would mean that manufacturers would give allowances and other services to large retail buyers but not to the wholesalers."

Joseph R. Anderson of Anderson-Hayes Wholesale, Havre, Mont., stated: "It was a long, hard fight to obtain the equality provided by this section, and its repeal would hurt most small retailers and wholesalers."

Sidney Brietbart of National Supply House Co., Inc., Aberdeen, Md., declared: "If this section were eliminated, chaotic conditions would result in that every buyer would ask for undeserved special considerations in order to undercut competition. Also, a manufacturer can favor one buyer to the detriment of another. Under such conditions, an atmosphere of 'anything goes' would be created. Indeed, it is estirely probable that extra special considerations could be split between the buyer and the manufacturers' representative. Payoffs for special considerations would be common."

H. Raymond Almy of Almy Brothers, Binghamton, N.Y., stated: "Giving advertising allowances to some and not to others merely means that the larger the chain, the more allowances will be offered to the detriment not only of small independents but smaller, independent type chains. It would amount to a price rebate."

Arthur W. Marshall of the A. W. Marshall Co., Salt Lake City, Utah, stated: "If section 2(d) were eliminated, it would enable the large chains and the large stores to buy candy at a much lower price than the smaller stores."

J. P. Fritz of the Fritz Company, Newport, Minn., said: "The elimination of the prohibition of discrimination between buyers would be equally disastrous for independent wholesalers and small retailers, and certainly the franchise groups would strongly benefit from the unfair, competitive situation."

J. Anthony Puissegur of the Candy Specialty Co., Crowley, La., said: "If one buyer receives a special advertising allowance, and his competition is denied this allowance, it will weaken the buyer who does not receive it."

Max S. Bloom of S. Bloom, Inc., Chicago, Ill., said that he was opposed to the elimination of Section 2(d) because "The allowance for advertising would encourage chain and cooperatives to sell at lower prices to the retail trade. Rather than use the allowances for advertising purposes, they would take the so-called 'advertising allowance' and use it to lower prices to the retail customer. If this type of buyer is permitted an advertising allowance, all types of buyers should have the same advantage."

Louis H. Wilhite of Wilhite Tobacco Co., Miami, Fla., said: "I do not feel that repeal of Section 2(d) would have as great an impact on the industry as might be expected. It is true at present that the advertising allowance must be made available to all or none, but the larger organization has sufficient buying and selling power to avail itself of the allowances. So if this section were repealed, it would permit the manufacturers to restrict their allowances to the large accounts, so the effect would remain the same."

Pierre E. Chagnon of the Meriden Candy & Tobacco Co., Meriden Conn., stated: "Elimination of this section would enable certain buyers to extract additional moneys from the manufacturer. This would be a disadvantage to the small operator."

William D. Royce of Sheehan Bros. & Hober, Inc., Missoula, Mont., is in favor of the elimination of Section 2(d). "I think that there should be a discrimination between buyers. Any manufacturer that is willing to pay or give allowances for advertising and is getting distribution of his products, especially new ones, should be able to offer special allowances. How many times in the last 35 years have we taken a new product, gotten distribution and made a real seller out of it, then about the third time around, everyone has the same item and no one does anything with it? It dies for everyone since it becomes a price item."

BROKER COMMENTS ON SECTION 2(d)

Brokers were also generally opposed to the deletion of Section 2(d), as indicated by the following comments.

Jules D. Schwartz of the J. D. Schwartz Co., Wyncoate, Pa., stated: "Small stores which are members of a cooperative or other buying group would be at a tremendous disadvantage. As far as the candy industry is concerned, we would lose our store merchandising and store promotional work for new products and for items which have special seasonal promotional efforts. This would put the burden on the movement of candy to the smaller stores. The effect would be such that the candy industry would lose favored positioning in stores and hence would lose volume in comparison to other products because of not having merchandise worked all the way through on promotional effort to the smaller stores."

Eugene A. Clemens of Fun Brands, Inc., El Paso, Texas, stated: "If this section were eliminated, the chain stores would merely pocket the advertising allowances and do no advertising."

R. W. Sproul of Jones-Sproul, Inc., Trumansburg, N.Y., said the elimination of this section would have an adverse affect on the industry. "Namely, an unfair advantage for the large chains over small accounts who do not have the buying capacity to compete."

Elwood F. Countess of Elwood F. Countess Associates, Ellicott City, Md., pointed out that "big business would get every advantage over the small business. Every manufacturer naturally is interested in big chains purchasing from them, and if discrimination is allowed, they will take every advantage to get their business."

Herman Eitelberg of the National Confectionary Salesmen's Association of America, points out that if all buyers did not receive the same allowance for advertising and other services, one buyer would be getting an advantage that another buyer did not receive, thus creating unjust competition."

Tom Gulick of Tom Gulick Co., Dallas, Texas, declared that "once again the small businessman, be he retailer or wholesaler, would be eliminated because of the unfair price advantages afforded the large companies through discriminatory allowances and services received solely because they were large buyers."

John H. Bond of John T. Bond & Son, Pasadena, Calif., pointed out that "to eliminate Section 2(d) could help the manufacturer by allowing him to concentrate on certain accounts."

Francis A. Shinnamon of F. A. Shinnamon & Associates, Ellicott City, Md., stated: "Most allowances of this type are false. Many are dummy services set up only to receive special allowances. Elimination of Section 2(d) would favor chain stores and large wholesalers."

Harry J. Moore of Moore Brokerage Co., Stone Mountain, Ga., declared that "advertising allowances could be indiscriminately used to reduce prices to large buyers, causing the elimination of many small businesses."

Mel D. Catlin of Milwaukee, Wis., declared that "the bigger volume buyers would get advantages although not performing to the extent of the allowances."

Maury Cook of O. R. Cook & Son, Columbus, Ohio, declared: "The 'bigs' would receive the majority of the allowances, based on their buying power."

Harvey N. Witcher of Harvey N. Witcher & Associates, Santa Ana, Calif., stated: "Discrimination in business is no different from discrimination in any other segment of life. We need to recapture and strengthen the quality of integrity in business."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kansas, declared: "This would result in many demands on the manufacturer that could drive him into bankruptcy."

Murray A. Cohen of Murray A. Cohen, Inc., Cherry Hill, N.J., stated that the elimination of this section would "deprive the smaller businessman of the opportunity to compete and would eventually drive him out of business."

Richard H. Lake of Robert E. Aumann Co., Inc., Indianapolis, Ind., stated: "This would make it difficult for wholesalers to service chain and co-op accounts, especially the larger ones, who are in a position to give and demand more for advertising."

John A. Blake of Blake Associates, San Francisco, Calif., stated: "All customers should be treated equally, large or small. Why favor the giant? If anything, the favor should be to wholesalers, not to direct buyers."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., stated: "Large corporate chains would accrue the greatest share of allowances due to massive buying power. The additional allowances would afford greater profits to the chain vs. the independent who in this case would not necessarily receive the additional allowances."

David L. Beecher of The Beecher Co., York, Pa., stated: "The bigger buyers will use more advertising and will thus demand larger allowances. The small buyer will not be able to compete."

James W. Allen, Jr. of Foote Bros. & Co., Norfolk, Va., declared: "I hope Congress will not see fit to change Section 2(d) of the Robinson-Patman Act. This would cause the small businessmen, like myself, to lose complete control. It would be another means of by-passing the small businessman and dealing direct, which would not only hurt me, as a small businessman, but all other small businesses which would not get the same treatment as is now shared under the law."

COMMENTS OF MANUFACTURERS ON SECTION 2(d)

Manufacturers also expressed opposition to deletion of Section 2(d), and a typical comment was that of J. L. Kretchmer of the American Licorice Co., San Francisco, Calif., who said: "I think that American private enterprise is responsible for the economic growth of this country. In many ways, free enterprise is what has made this country great. Therefore, I think that American business is just as much entitled to protection from discrimination as the American individual. This includes discrimination on allowances given for advertising, services and facilities, and also when the seller provides these services and facilities. To rob American business of its fair protection is like killing the goose that laid the golden egg."

A. Vard Maxfield of Maxfield Candy Co., Salt Lake City, Utah, said the deletion of this section would create chaos. "How could there ever be any ethics in business? If the floodgates were opened, we would have a situation of dog-eat-dog. Coercion would abound, and there would be no limit to what would happen, with the giants taking advantage of every situation they could."

COMMENTS OF WHOLESALERS ON SECTION 2(e)

As to the proposed elimination of Section 2(e), members of the candy industry were equally opposed to any changes.

Anthony J. Bonadio of Victor Bonadio, Inc., Danbury, Conn., said if this section were eliminated, "the seller would favor the large chains and thus afford them better prices."

Perry A. Kiritsy of N. G. Gurnsey Co., Inc., Keene, N.H., stated: "If Section 2(e) were eliminated, there would be discrimination between the large volume buyer and the medium and small buyers. The large volume buyer would receive buying allowances and other incentives over the small buyer and the competitive edge would be lost. The candy distribution system would be weakened and eventually it would break down."

Raymond Covitz of the Bay State Tobacco Co., Worcester, Mass., said: "The buying practices would not change, but why should there be discrimination for or against any class of buyer? If allowances are not prohibited, the advantage goes to the large, direct-buying retailer. If anything would change, it would be the sellers, who would soon find themselves in a competitive jungle."

Ralph A. Schewe of the Merrill Candy Co., Merrill, Wis., stated: "Buyers could suggest and attempt to show that they could provide their own services usually rendered by sellers more reasonably and thereby receive unfair price concessions based on services whether rendered or not."

Joseph R. Anderson of Anderson-Hayes Wholesale, Havre, Mont., declared: "This section protects the small merchant from the buying powers of the larger ones."

Milton R. Gould of Paramount Distributors, Inc., Tulsa, Okla., stated: "If manufacturers are allowed to give services to the big chains, it not only discriminates against smaller accounts, but also prevents the local wholesalers from competing in the chain outlets."

H. Raymond Almy of Almy Bros., Binghamton, N.Y., declared: "Buyers would be putting tremendous pressure upon sellers and would demand all sorts of gifts, which is an immoral practice, lining the pockets of the buyer and not reducing prices to the consumer."

Arthur W. Marshall of the A. W. Marshall Co., Salt Lake City, Utah, stated: "If Section 2(e) were eliminated, the larger stores would only buy and push candy which the manufacturer would give them an extra discount on."

J. P. Fritz of the Fritz Company, Newport, Minn., said: "Results here would probably mean that sellers would discriminate against wholesalers and small retailers."

Arnold Gordon of Jack Gordon Tobacco Co., Inc., Syracuse, N.Y., stated: "This could lead to 'favorite son' customers. There are always some buyers who have an 'in' with the seller in some way, and this would tend to deepen that practice, or perhaps even spawn it."

J. Anthony Puissegur of the Candy Specialty Co., Crowley, La., stated: "This would hurt the small buyer who does not receive the services and facilities."

Lewis H. Wilhite of Wilhite Tobacco Co., Miami, Fla., stated: "Elimination of this section would tend to promote the most unfair competitive advantage of all. In addition to the usual discounts, additional allowances could be claimed for warehousing, handling, etc."

James R. Dozier of Washburn Cigar Co., Montgomery, Ala., stated: "The big buyer could use his power and get concessions from the manufacturers, whereas the independents could not."

George A. Jones of Yankee Wholesale Co., Inc., Wiscasset, Maine, said: "The wholesaler, for his value added service, accepts a partial partnership with the manufacturer in promoting and proving the sales worth of a given product. He is not looking for a one-shot, fast-turnover item as the group buyer quite often is. He continually searches for products whose worth as a staple or seasonal regular can be expected. If, by continually eroding the potential market for the legitimate wholesaler by permitting group retailers to coerce functional discounts for functions they do not perform, it would tend to eliminate the wholesaler. And if the wholesalers were to disappear from the distribution scene, our economy would no longer be in a position where the small businessman with a good idea and some courage could start in a small way in any facet of manufacturing or retailing. We must have a healthy wholesale distribution system if we wish to encourage small business."

BROKER COMMENTS ON 2(e)

Brokers also expressed opposition to elimination of Section 2(e).

Herman Eitelberg of the National Confectionery Salesmen's Association of America, stated: "If there is discrimination among buyers, the favored one would be able to undersell the smaller businessman whose place of business may be only half a block away from the favored one."

Jules Schwartz of the J. D. Schwartz Co., Wyncote, Pa., said: "The seller who provides services and facilities to buyers, if not provided equally to all buyers, would then, in essence, create special interests with special accounts. Therefore, you would have unfair competition, and you would have favoritism which would be uncontrollable. Store work and merchandising aids to large wholesale buyers and also to large chains would be channeled in that direction, and once again the scales would tip, as far as candy is concerned, toward the larger accounts. Hence, without good distribution in all accounts which the government has provided for under the Robinson-Patman Act, this would then cut down on the overall volume within the industry because the larger accounts would not increase their scope enough to compensate for all the loss of all of the smaller accounts and the distribution they offer to the candy industry."

Tom Gulick of Tom Gulick Co., Dallas, Texas, said: "Services and facilities of the seller are the equivalent of price advantages to an account, and only the very large accounts would receive the use of these services and facilities."

R. W. Sproul of Jones-Sproul, Inc., Trumansburg, N.Y., stated: "I feel it unfair to penalize an account due to the fact that his volume does not allow him to perform in the same manner as larger accounts."

Jack J. Sane of J. J. Sane Brokerage, Kenmore, N.Y., stated: "If all sellers could not offer the same program to all their customers, large and small, it certainly would not be fair. A small manufacturer who just couldn't include such a program, due to limited working capital, would be forced out of business."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kansas, declared: "This would abolish the healthy competition that we have today and end the free enterprise system."

Harry J. Moore of Moore Brokerage Co., Stone Mountain, Ga., stated: "Large chain buyers would be able to demand greater services than independent buyers, thus eliminating services now afforded to small businesses."

Harvey N. Witcher of Harvey N. Witcher & Associates, Santa Ana, Calif., said: "I see nothing wrong in a manufacturer or seller performing certain services in the way of special displays and other merchandising activities. However, wherever possible these services should be made available to all."

David L. Beecher of The Beecher Co., York, Pa., stated: "The large buyer can provide more services and facilities and will demand larger allowances. A small buyer cannot compete and will be eliminated."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., stated: "The elimination of Section 2(e) would be disastrous for the independent retailer. This would mean that the manufacturer could establish a special pricing policy for certain national grocery chains to assure themselves of the chains' business. Such practices would place the small independent retailer at an obvious disadvantage in terms of his ability to compete."

C. J. Ferguson of Dehm & Co., Detroit, Mich., stated: "In maintaining a free market for a company's products, the seller's prerogative to judge to whom services will be provided should be retained."

Daniel R. Gillett of the Dan Gillett Brokerage Co., Pittsburgh, Pa., stated: "The large chain store discount operation, supermarket, chain drug and chain variety stores buy directly from the manufacturers at the same prices paid by the wholesaler. The large chains already enjoy a differential of 15 to 20 percent over the small independent retailer who buys from the wholesaler."

James W. Allen, Jr., of Foote Bros. & Co., Norfolk, Va., stated: "If this section were eliminated, we could not afford the new demands put on us by our large customers."

COMMENTS ON MAINTENANCE OF COMPETITION

As to the proposed revision which would assume that the survival of a competitor is not significant to the maintenance of competition, wholesalers had a variety of comments.

Anthony J. Bonadio of Victor Bonadio, Inc., Danbury, Conn., declared that "small business would cease to exist."

Erwin A. Michelson of Glikin Bros., Newark, N.J., said: "This would cause higher prices because no new small competitors could get started, and the prices would rise due to the elimination of competition."

Carl F. Vonderhaar of Von's Supply Co., Little Falls, Minn., said: "No one should be insignificant. If you destroy competition or deny equal opportunity, you are infringing on the independents' rights. The small businessman would be eliminated."

Raymond Covitz of Bay State Tobacco Co., Worcester, Mass., stated: "Small business is still the backbone of this country, and every action which hurts small business hurts the country. Has not every Supreme Court decision affirmed the fact that large or small, rich or poor, every citizen is entitled to the same protection?"

Ralph A. Schewe of the Merrill Candy Co., Merrill, Wis., stated: "I believe this would lead to a complete breakdown of any protection for smaller middlemen, because the large operators would claim that they could fill any void in the distribution system. Large operators would cut prices and try for a lower price from suppliers in an effort to eliminate competition."

Edwin L. Pierson, Jr., of the Candy Division of Hayden Flour Mills, Tempe, Ariz., stated: "This would virtually eliminate the small wholesaler in any line of business."

Sidney Brietbart of National Supply House Co., Inc., Aberdeen, Md., said: "The very thought that a small competitor is not entitled to the same protection under the law as a large one is abhorrent, immoral and indecent in a democratic society, which depends on the concept of equality under the law. At the very time when black members of our society will try to enter and claim a stake of the economic life, the law should and must shield the small businessman from unfair competition based only on size. The law may as well provide more protection for the healthy of our society compared to the sick, because they represent the strength of our country. God protect us from this philosophy and legal system whether in the health or economic spheres."

Sam P. Joseph of Joseph Brothers, Monroe, Mich., declared: "This is not the American way of life, where we are all supposed to be equal. I have as much right to survival as my competitor. Large wholesalers could move into my area and sell at a loss for two or three years and drive us to the wall. It would be unfair and un-American."

H. Raymond Almy of Almy Bros., Binghamton, N.Y., stated: "It is said that this country is a land of opportunity where one has the right to initiate a business and to fail as well as to be successful. The only ones who could start a business would be the giants with large financial resources. Everyone knows,

or should know, that the more competition there is, the better it is for the consumer. In time, the elimination of competition will have the result of higher prices. Large chains are not necessarily efficient and become less so as competition is reduced."

Charles B. Bair of C. E. Bair & Sons, Inc., Harrisburg, Pa., declared: "This, of course, would drive the small operator out of business, and is definitely against the practice of free enterprise. It smacks of socialism where one large business controls the whole enterprise."

Arthur W. Marshall of the A. W. Marshall Co., Salt Lake City, Utah, stated: "The survival of a competitor is very significant to the maintenance of competition, particularly in the candy business which is comprised of many small wholesalers. Repeal would mean the killing off of competition from the small jobber and the small retailer, which would benefit the larger jobber and the giant retail chains."

Duane Riedel of Candy Service Co., Aberdeen, S. Dak., stated: "In our sparsely populated part of the country, the large supplier is practically nonexistent. The small jobber or retailer is needed to service the few people in a large area."

Ron Waldron of Waldron Confectionary, Inc., Oak Park, Ill., declared: "If competition is so small, why remove the protection? Some protection helps to encourage new business. It does not guarantee success, but gives a new enterprise a chance."

Harold Wagner, Jr. of the Wagner Candy Co., Paducah, Ky., declared: "In a few years this nation would be served only by a few suppliers, creating more unemployment, more vacant buildings, and more dissolution of the American people. The maintenance of competition starts with the smallest competitor, not with the largest. More often than not it is our small competitor who prevents us from raising prices, rather than our large competitor."

J. Anthony Puissegur of the Candy Specialty Co., Crowley, La., said: "We can't say that a small buyer is insignificant and that he does not deserve any protection. Many small buyers together comprise a significant element of our competitive economy and render a great service to the well-being of our country. They are a necessary portion of our economic and potential strength."

A. G. Mason of the Mason Candy Co., Trinidad, Colo., stated: "The assumption in this proposal must be the brainchild of those few who seek monopoly, and most certainly not of small business."

Lewis H. Wilhite of Wilhite Tobacco Co., Miami, Fla., stated: "To change this section would further reduce the number of small businesses and allow a monopoly by a select few."

Pierre E. Chagnon of Meriden Candy & Tobacco Co., Inc., Meriden, Conn., stated: "Any law that will not protect the small man from the pressure of the big fellow is bad, since there are many more small people than big. I think our country was built by small people. The business that can get special prices and then use them to sell for less than the small competition will drive the small out of business. That is not right. It could drive many of my customers out of business, since I could not make available to them the same special deals."

BROKER COMMENTS ON MAINTENANCE OF COMPETITION

Among comments of brokers on this point were the following:

Eugene A. Clemens of Fun Brands, Inc., El Paso, Texas, declared: "The large chains would soon put the small operator out of business."

Tom Gulick of Tom Gulick Co., Dallas, Texas, stated: "If the small businessman has no legal protection from the large giants, he is eliminated from the competitive picture solely on the grounds that he does not have the capital funds to stay competitive and he is not afforded the price advantages offered those who buy big."

John H. Bond of John T. Bond & Son, Pasadena, Calif., declared: "This proposal would definitely mean the end of the small wholesaler."

Mel Catlin of Milwaukee, Wis., stated: "I believe the small candy distributor of our industry would be forced to the wall."

Maury Cook of O. R. Cook & Son, Columbus, Ohio, stated: "The little wholesaler would be swallowed up in a very short time."

Harvey N. Witcher of Harvey N. Witcher & Associates, Santa Ana, Calif., said: "This could be good for business as it would tend to keep everyone sharp and on his toes."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kans., stated: "This would be the opening blow to kill free enterprise. Small competitors would be the first to go, followed by others in order of size. We could end up with giants who could control the market as they wished. This would really give inflation a boost."

Daniel R. Gillett, Pittsburgh, Pa., declared: "Elimination of the small independent kills initiative in business. It is virtually impossible to introduce a new product to a large chain organization without large capital backing. The small customer usually provides the initial distribution."

Murray A. Cohen of Murray A. Cohen, Inc., Cherry Hill, N.J., stated: "This would drive the small man out of business."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., declared: "Since the Fred Meyer decision, we have noted a resurgence of the strong, independent retailer. One of the main reasons for this occurrence is the enforcement of Section 2(d), which assures that all allowances and promotions be offered to all retailers regardless of size."

David L. Beecher of The Beecher Co., York, Pa., said: "No buyer is so small that he should not be allowed the opportunity to compete."

James W. Allen, Jr., of Foote Bros. & Co., Norfolk, Va., stated: "It must be realized that the small businessman is the real backbone of the nation, and without some protection from the competitive picture, he, like ourselves, would have to go out of business."

Jules D. Schwartz of the J. D. Schwartz Co., Wyndotte, Pa., declared: "The small man definitely has to be protected, particularly in the candy industry, or we lose a vital force of distribution of products in our country, and this would tend to put a lid on the growth of the candy industry."

ELIMINATION OF PROTECTION FOR WHOLESALERS' CUSTOMERS

The proposed changes in the Robinson-Patman Act would eliminate protection for the wholesaler's customers who are in competition with chain retailers, whereas the present Act says that if the discrimination by the manufacturer would injure or prevent competition with either of his customers or with a customer of any of these customers, it is prohibited. In responding to the question as to what effect the proposed change would have, wholesalers answering our questionnaire made the following comments:

Anthony J. Bonadio of Victor Bonadio, Inc., Danbury, Conn., stated: "This would be very unfair to small business, making it harder to stay in business."

Erwin A. Michelson of Glikin Bros., Newark, N.J., said: "This would absolutely eliminate the small candy dealer."

Carl F. Vonderhaar of Von's Supply Co., Little Falls, Minn., said: "This would give an advantage to the chains which is undeserved, not needed and ridiculous. The law should give the small businessman and the distributor servicing him preferential treatment. Instead of this proposal, why not subsidize small business? Has anyone looked at the empty buildings in their town?"

Raymond Covitz of Bay State Tobacco Co., Worcester, Mass., declared: "This change would increase the spread between prices the chains can afford to charge for their goods and the price the independent must charge for his goods. This would further injure the small dealer."

W. A. McCarty, Jr., of McCarty-Hull Cigar Co., Inc., Amarillo, Texas, said: "The independent retailer could not survive, which means that probably we could not survive."

Ralph A. Schewe of Merrill Candy Co., Merrill, Wis., declared: "I believe the large chain stores could ask for and would get prices below those of the wholesaler, based on their size, and would eliminate retailers who depend on wholesalers for their supplies, because the wholesalers would not receive the same prices as the large chains who are direct buyers."

Edwin L. Pierson, Jr. of the Candy Division of Hayden Flour Mills, Tempe, Ariz., said: "Manufacturers who are now selling through wholesalers would immediately begin selling directly to retailers. As a wholesaler, I therefore would have no protection whatever."

Joseph R. Anderson of Anderson-Hayes Wholesale, Havre, Mont., said: "This section of the law is the only thing that lets many independent merchants survive at present."

Sidney Briebart of National Supply House Co., Inc., Aberdeen, Md., stated: "Many retailers would go out of business and wholesalers would suffer as well. Many wholesalers would have to sell out to their larger competitors."

Sam P. Joseph of Joseph Brothers, Monroe, Mich., said: "Independent retailers would discontinue sales of candy, leaving the candy business entirely in the hands of a few large chains who would then have such a large volume they could pressure manufacturers into unheard of discounts."

Milton R. Gould of Paramount Distributors, Inc., Tulsa, Okla., stated: "The only practical effect of this change that I can see is that the manufacturers would be doing legally what they are now doing illegally."

Charles B. Bair of C. E. Bair & Sons, Inc., Harrisburg, Pa., stated: "Our retail customers are already having a tough time competing with chain stores. This would make it impossible if manufacturers could discriminate further and sell to the customers of our customers."

J. P. Fritz of the Fritz Company, Newport, Minn., said: "This change probably would have very little practical effect on the candy industry, as direct-selling manufacturers are already, and have for some time, been offering special services and special discounts and other merchandising helps and services which are not available to the wholesaler and the wholesaler's customers."

Arnold Gordon of Jack Gordon Tobacco Co., Inc., Syracuse, N.Y., stated: "The wholesaler's job includes protecting his customers for what are obvious reasons. Without legal provisions banning unfair practices, a great many of his customers would lose competitive position in the market. How long would our business survive with chain retailers? Laws should never favor any one group of sellers, buyers, or manufacturers."

Harold Wagner, Jr. of the Wagner Candy Co., Paducah, Ky., said: "If this were changed, we would revert to the condition we had at the turn of the century."

J. Anthony Puissegur of the Candy Specialty Co., Crowley, La., said: "Every business deserves and is entitled to a fair and just deal. By eliminating the customer of the wholesaler we would be hurting the competitive phase of our economy."

Max S. Bloom of S. Bloom, Inc., Chicago, Ill., stated: "The small retailer could not compete as he would be at a disadvantage."

George A. Jones of Yankee Wholesale Co., Wiscasset, Maine, declared: "Knocking out the wording 'or with the customer of any of these customers' would seem to release the manufacturer from any obligation whatever to the small retailer who may handle only 10 or 15 percent of his total goods, but is closer to 50 percent of the actual number of outlets offering the goods for sale. I can foresee that in the candy industry a continual trend of chain purchasing at a more favorable discount would eventually destroy the small retailers' willingness to be the test market for new items. Why should he gamble on a new item and attempt to promote and merchandise it if, as soon as it is proven, the manufacturer will permit the chains to undersell him by giving them the wholesaler's discount as well as quantity buying allowances?"

Pierre E. Chagnon of Meriden Candy & Tobacco Co., Inc., Meriden, Conn., stated: "To make this change would make that part of the law worthless. It would permit discrimination by manufacturers."

BROKERS' COMMENTS

On this proposed change for the elimination of protection for the wholesaler's customers, brokers had a variety of comments.

Jack J. Sane of J. J. Sane Brokerage, Kenmore, N.Y., said: "I feel that the wholesale distributor should at all times be in a position where he can sell all manufacturers' products to his retail customers at a fair profit so they, in turn, can compete with the large national retail chains."

Herman Eitelberg of the National Confectionery Salesmen's Association of America said: "Our business is such that many retailers can buy direct from manufacturers, whereas many are dependent on wholesalers for their merchandise. This being the case, it is very important that prices remain stable both for the wholesaler and the large retailer."

Hix F. Carter of Eben Rawls & Associates, Winston-Salem, N.C., stated: "The present act is not unfavorable to the small or the great, and it should be allowed to stand as it is."

Mel D. Catlin of Milwaukee, Wis., said: "This would create further damage to small operators."

Maury Cook of O. R. Cook & Son, Columbus, Ohio, stated: "The wholesaler would lose large accounts, and in some cases they would be forced out of business."

Harvey N. Witcher of Harvey N. Witcher & Associates, Santa Ana, Calif., stated: "This would not hurt my business. The wholesalers in my marketing areas are on top of the situation. However, the small wholesaler, who cannot qualify for freight savings on quantity purchasing, could have a real disadvantage."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kans., stated: "This proposed change would result in large organizations demanding and getting special treatment that in the end would kill any chance of smaller organizations competing."

Richard H. Lake of Robert E. Aumann Co., Inc., Indianapolis, Ind., stated: "The basic strength of the brokerage business is, of course, with the wholesaler. This proposed change would make the wholesaler's task more difficult, and would make the introduction of new items much more difficult."

John A. Blake of Blake Associates, San Francisco, Calif., said: "It would force more wholesalers out of business."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., stated: "In effect, the proposed changes would permit direct-buying chains either to undersell or realize greater profits from allowances offered them, but not passed on to independent retailers by wholesalers."

C. J. Fergusen of Dehm & Co., Detroit, Mich., stated: "Even under the present act, independent retailers are finding it increasingly difficult to compete with chain stores."

James W. Allen, Jr. of Foote Bros. & Co., Norfolk, Va., said: "Without some protection, the small businessman is doomed. Large customers could sell the low-cost items in the candy industry and make it up in other aspects of their business. They would run out the small candy operator completely."

COMMENTS OF MANUFACTURERS

Among comments by manufacturers on this proposed change affecting the wholesaler's customers were the following:

Richard S. Gates of the Charles N. Miller Co., Boston, Mass., said: "I believe the revision contemplated would be in order. I personally believe Justice Harlan was right in his dissenting opinion in connection with the Fred Meyer case. The practical requirements of compliance with the recent decision make promotional programs very difficult to handle from the manufacturer's standpoint. In addition, I should think enforcement would be almost impossible. It seems to me that the Supreme Court has gone beyond the original intent of the act."

E. J. Sittler of Mrs. Sittler's Candies, Cicero, Ill., stated: "Customers need some protection from large chains."

A. Vard Maxfield of Maxfield Candy Co., Salt Lake City, Utah, declared: "We have had a little experience the last four years along this line. A competitor, doing about four times the volume as we, reduced the price of one item about 30 percent with only one purpose in mind and that was to take the business away from us. We were both selling about the same amount, but he had about \$3 million worth of business in his other lines to carry the loss on this one item, even though it was substantial. The loss was about \$165,000 a year on \$500,000 volume of the item. If we had met his price, we would have gone out of business the first year. When we did not meet his price, he was able to move in and take most of our business away from us. This was done maliciously. There are principles of right and wrong, and we need these laws on the books to protect the integrity of all businesses."

COMMENTS ON LIABILITY OF THE BUYER

In regard to Section 2(f) of the Robinson-Patman Act, under the suggested changes the buyer would not be liable unless he became a knowing accomplice to a clear violation. In regard to this, wholesalers had the following comments:

Anthony J. Bonadio of Victor Bonadio, Inc., Danbury, Conn., said: "There would be a rash of violations by large buyers, claiming they did not know there was a clear violation."

Erwin A. Michelson of Glikin Bros., Newark, N.J., said: "The large buyer would get unbelievable price concessions and would increase his profit margins considerably."

Carl F. Vonderhaar of Von's Supply Co., Little Falls, Minn., declared: "This implies the buyer does not know what he is doing. If he doesn't, he won't hold his job very long. Since when is ignorance of the law an excuse?"

Perry A. Kiritsy of N. G. Gurnsey & Co., Inc., Keene, N.H., stated: "Under Section 2(f) of the Robinson-Patman Act, the buyer knows he is in violation if he receives concessions not allowed to others. If this section were eliminated, both the buyer and the manufacturer would easily discriminate."

Raymond Covitz of the Bay State Tobacco Co., Worcester, Mass., said: "The large buyer would have no compunction about demanding special concessions, realizing that his chance of being held liable was remote."

Don Cresswell of Don Cresswell Wholesale, Inc., Casper, Wyo., stated: "Ignorance of the law is no excuse. This would seem to apply here as well as to any other violation of the law."

W. A. McCarty, Jr. of McCarty-Hull Cigar Co., Inc., Amarillo, Texas, stated: "This would result in increased pressure from the big boys for concessions, which they would get."

Ralph A. Schewe of the Merrill Candy Co., Merrill, Wis., declared: "The large buyer could ask for any concession and negotiate any deal favorable to him and then claim he knew nothing of a violation. He wouldn't have to ask the seller if his price was the same as any other buyer's."

Edwin L. Pierson, Jr. of the Candy Division of Hayden Flour Mills, Tempe, Ariz., said: "This change would clear the way for the large buyer who could accept any type of extra concession and if caught, could plead ignorance of the law. I believe this would be unconstitutional since we cannot plead ignorance of the law when a crime is committed."

Sam P. Joseph of Joseph Bros., Monroe, Mich., said: "The large buyers would make a joke of this section."

Charles B. Bair of C. E. Bair & Sons, Inc., Harrisburg, Pa., declared: "If the buyer is not made liable for any of these breaches of the Robinson-Patman Act, he would be making greater demands for special concessions from the wholesaler or manufacturer."

Arthur W. Marshall of A. W. Marshall Co., Salt Lake City, Utah, said: "In this event, the buyer for a large firm would ask for special concessions from the manufacturer and would try to buy from only those who would give him special concessions."

Duane Riedel of the Candy Service Co., Aberdeen, S. Dak., said: "This should not be changed for just plain common sense reasons. We are all prone to accept a better deal, or to try and demand a better deal."

J. P. Fritz of the Fritz Company, Newport, Minn., said: "I think very few buyers would admit any knowledge of a violation, and it would certainly be hard to prove."

Arnold Gordon of Jack Gordon Tobacco Co., Inc., Syracuse, N.Y., stated: "This change could make some stores 'super buyers' and give them the sense that they cannot be overlooked in their demands. However, any conscientious seller, providing none of the above restrictions are lifted, would not be in a legal position to allow any special concessions to the super buyer, regardless of size. All the more reason not to allow the demise of the Robinson-Patman Act as now written. This particular proposal is dependent upon all of the foregoing ones."

Harold Wagner, Jr. of the Wagner Candy Co., Paducah, Ky., stated: "This change would benefit only the dishonest. We have a good law that does not need to be changed, if the change would only benefit the few."

J. Anthony Puissegur of the Candy Specialty Co., Crowley, La., stated: "The buyer should be held guilty if he receives concessions that are discriminatory in violation of the act. He is just as guilty as the seller. The reason for this section was that the large buyer was using his power to get discriminatory allowances. If Section 2(f) is revised, the same practice will mushroom again. The small businessman is the backbone of our country and economy. Let's not do anything to weaken that backbone. Rather, let us strengthen it."

Pierre E. Chagnon of Meriden Candy & Tobacco Co., Meriden, Conn., said: "If the buyer knows he may not be held liable for a violation, he will be more demanding for special prices, special deals, etc."

COMMENTS OF BROKERS ON LIABILITY OF THE BUYER

On this point, brokers had various comments.

Tom Gulick of Tom Gulick Co., Dallas, Texas, said: "If anything, this section should be strengthened, rather than weakened. Every buyer is aware when he is receiving special favors, and he should be deterred from even suggesting that he should receive special concessions solely because his is a large business."

Jules D. Schwartz of the J. D. Schwartz Co., Wyncote, Pa., said: "I think this gets into very fine lines of distinction, and it would take court processes to determine the line. In other words, I do not think there would be much of an effect in this particular case."

Eugene A. Clemens of Fun Brands, Inc., El Paso, Texas, said: "This is the same old story. The large buyer would soon eliminate all of his competitors. We need this provision."

Francis A. Shinnamon of F. A. Shinnamon & Associates, Ellicott City, Md., said: "Many buyers would put the pressure on for special allowances and many manufacturers would consent to these demands."

R. W. Sproul of Jones-Sproul, Inc., Trumansburg, N.Y., declared: "I feel that the buyer should be liable whether it's knowingly or otherwise. It should be his responsibility to determine any violation."

Herman Eitelberg of the National Confectionery Salesmen's Association of America said: "This is one of the most important sections of the law. If the buyer knows that he cannot be held liable, he will use much greater persuasion to demand discriminatory prices."

Hix F. Carter of Eben Rawls & Associates, Winston-Salem, N.C., stated: "This section should not be altered. The responsibility needs to be shared by the buyer as well as the seller."

Maury Cook of O. R. Cook & Son, Columbus, Ohio, stated: "If the buyer were immune, he would just look the other way when he received special concessions and would therefore encourage this practice."

Albert D. Krebs of Al Krebs Brokerage Co., Shawnee Mission, Kans., stated: "To excuse a buyer who receives special treatment on the premise that he isn't aware of it is like saying, 'he didn't steal that chicken, it just followed him home.'"

James W. Allen, Jr. of Foote Bros. & Co., Norfolk, Va., declared: "As it stands now, even though the buyer knows that he is liable, he still tries to take advantage of every situation, and in many cases knowingly asks for concessions which are in violation. If the law were changed, the buyer would be in control of the situation and would make demands on small manufacturers, small brokers and candy operators which they cannot financially stand and would thereby weaken their position in the economy of our country."

Murray A. Cohen of Murray A. Cohen, Inc., Cherry Hill, N.J., declared: "The buyers would take advantage of these loopholes if the law were changed."

Don Falkowitz of F & R Confectionery Sales, Inc., Syracuse, N.Y., said: "If the large buyer were not liable, he would ask for as much special consideration as he could possibly get."

C. J. Ferguson of Dehm & Co., Detroit, Mich., declared: "Both parties should continue to be held liable for a violation. However, the buyer should be held even more responsible for his acts than the seller. The larger the buyer, the greater pressure they are now exerting for unfair concessions."

Daniel R. Gillett of Pittsburgh, Pa., declared: "To the ordinary citizen, ignorance of the law is no excuse. Why should anyone assume that a highly paid buying specialist wouldn't realize when he is cheating? The buyers who are hired to extract special discounts from weak salesmen are thoroughly trained in the art of burglary, and the veteran broker can spot them on the first handshake."

COMMENTS OF MANUFACTURERS ON LIABILITY OF THE BUYER

Among opinions expressed by manufacturers on this point were these:

D. O. Lynch of The Nestle Co., White Plains, N.Y., declared: "Buyers, being only human, tend to take the benefit of any doubt. The law as presently written reduces an area of doubt. The proposed change would increase the area of doubt and thereby increase the number of violations."

Robert Jaret of Jaret Imports, Inc., Brooklyn, N.Y., declared: "It would seem that it is the buyer's obligation to understand possible violations of the Robinson-Patman Act or any other law. I personally feel that the great majority of buyers do, and this would seem to give them a chance to avoid penalties by claiming ignorance of the law."

EFFECT ON COMPETITION IF ROBINSON-PATMAN ACT WERE NULLIFIED

Wholesalers who were in business prior to 1936, when the Robinson-Patman Act became effective, were asked to describe some of the circumstances which existed then which are no longer permitted under the law and asked to express

their opinions on what might be the effect on competition if such practices were permitted today. Although most who responded were not in business in 1936, replies from those who were included the following:

Perry A. Kiritsy of N. G. Gurnsey Co., Inc., Keene, N.H., said: "Loss leaders were in effect and very harmful to the overall competitive practice of the economy. If we didn't have the law today, it would lead into a dog-eat-dog type of business atmosphere and be harmful. If some of the present practices of today's big businesses are not stopped or checked, we will have violations of the present law. For example, providing personnel services to the large volume accounts on a regular basis to stock shelves and take inventory. Also, to provide a year-round salesman to attend meetings each month or each week in different cities or towns of the large chain buyers."

Harold Wagner, Jr. of the Wagner Candy Co., Paducah, Ky., said: "My father who founded this company 51 years ago, commented, 'Had it not been for the Robinson-Patman Act, myself and many of my smaller customers probably would not have survived, or been able to offer their customers the products they deserved.'"

A. G. Mason of the Mason Candy Co., Trinidad, Colo., reports: "Prior to the Robinson-Patman Act, some small retailers bought candy bars by the box from some chain stores at the exact same price some manufacturers were charging the wholesale distributor. There must have been a good brokerage allowance."

Max S. Bloom of S. Bloom, Inc., Chicago, Ill., stated: "We very definitely remember conditions before the Robinson-Patman Act was passed. For example, when one large company subsidized an account in Chicago to the extent of a five percent rebate, it nearly undermined the market."

Pierre E. Chagnon of Meriden Candy & Tobacco Co., Inc., Meriden, Conn., said: "I was not in business before 1936. But I do recall the law was passed to protect the little guy from unfair practices which were of benefit to large business. I think the small man still needs this protection. In fact, more now than at any time."

COMMENTS OF BROKERS ON THE ROBINSON-PATMAN ACT IN GENERAL

Various brokers also commented on this question.

R. W. Sproul of Jones-Sproul, Inc., Trumansburg, N.Y., said: "I feel, as a broker, that I would be out of business without the Robinson-Patman Act, and there would be few if any accounts other than chains who would, in turn, be telling us what they would pay for the goods we sell."

Herman Eitelberg of the National Confectionery Salesmen's Association of America, who was a candy broker in 1936 when the Robinson-Patman Act was passed, said: "The practice of large buyers before the Robinson-Patman Act was enacted was to request samples from one manufacturer and then ask all competitors to quote on that item. This forced prices down to such an extent that many manufacturers, who catered to large retail buyers, went bankrupt. The records will show the truth of this statement. I remember 12 of my large customers, who became known as the 'big twelve,' demanding a lower price for my merchandise than I was getting from my other customers. They absolutely refused to buy my products unless I gave them a better price. I also remember opening up a very large account, for which I received by regular rate of commission, until one day my principal told me that he could no longer pay me my regular commission and that it would be cut to one percent because he had to make concessions to that account. I am against the proposed changes in the Robinson-Patman Act, and I think it would be a catastrophe for our business if the act were repealed."

John A. Blake of Blake Associates, San Francisco, Calif., said: "In those days, it was a price fiasco, and the buyer with the biggest gun got the best prices."

Daniel R. Gillett of Pittsburgh, Pa., declared: "The Robinson-Patman Act would not have been necessary if the large outlets had not taken advantage of their buying power to seek an advantage over the smaller competitors."

GENERAL COMMENTS ON PROPOSED CHANGES

A number of general comments were received in regard to the proposed changes in the Robinson-Patman Act. Among them was a letter from Louis H. Breading of the Lake City Wholesale Co., Inc., Warsaw, Ind., who said: "I firmly believe that the Robinson-Patman Act has been a great aid in protecting small businesses from being wrecked by large companies. Buying practices of the

large companies would bring so many concessions from manufacturers that a small operator could not compete price-wise. As the big companies created a monopoly by forcing small independent businesses out of operation, you would find fewer and fewer people in control. As control gets more centralized, it becomes easier and easier for the government to take over.

"Lenin, in his book years ago, said that the reason America would resist the road to communism is because of the large number of independent businessmen. Once that obstacle is removed, can socialism, a step toward communism, be far away?

"The Robinson-Patman Act has done much to prevent the elimination of the small businessman. The big companies may wipe out their competition, but they cannot remove the function performed by their competitors. President Nixon, in his State of the Union message, set out as a goal for America in the coming decade 'new opportunities for ownership.' How can such a goal be achieved in the face of forces bent on destroying some of the very things that help the small independent businessman compete in the free enterprise system?

"I therefore am opposed to the proposed changes in the Robinson-Patman Act."

J. L. Kretschmer of the American Licorice Co., manufacturer of San Francisco, Calif., said: "We consider the Robinson-Patman Act to be of paramount importance to the protection of the free enterprise system. Without it many small but efficient concerns would be forced out of business. Our own industry would be robbed of the creativity, innovation, and wide distribution presently provided by candy wholesalers. New item introduction would be restricted to the bureaucracy and red tape often encountered when showing new items to large buying organizations resistant to change.

"The ultimate penalty would be suffered by the consumer. He would be forced to select the items he wanted to purchase only from those the large chains wanted to handle in their stores. The small wholesalers and retailers are willing to handle many items in large demand that the large buyers cannot be bothered with. These smaller operators are an important link between the producer and the consumer. This line of communication is very important to new product development and new packaging ideas.

"We do not favor the proposed changes in the Robinson-Patman Act, and we do not favor repealing the act."

Louis G. Shoemaker of the Palmer Candy Co., wholesaler and manufacturer of Sioux City, Iowa, said: "It is our view, based on 30 years in the candy business, that the proposed changes in the Robinson-Patman Act would effectively remove any controls which the act has over the buyer-seller relationship in this industry.

"These controls are the only thing that the buyers for the volume confectionery retailers and wholesalers respect in their dealings with suppliers and their representatives. Removal of these controls would throw all of the pressure of the volume buyer on the seller. We are satisfied that such conditions would leave the volume buyers with all of the advantages and the smaller buyer, retailer or wholesaler, would suffer severely, if they survived. The operations of all but the largest confectionery suppliers would also be seriously affected.

"As a regional candy manufacturer and also an area wholesaler, we are in favor of leaving the Robinson-Patman Act in effect as a control against the unfair demands of the volume candy users."

The corporation lawyer for Tom Huston Peanut Co., Columbus, Ga., J. Madden Hatcher of the law firm of Hatcher, Stubbs, Land, Hollis and Rothschild of Columbus, stated: "If Section 2(e) of the Robinson-Patman Act was deleted, I think more large buyers would possibly receive more brokerage commissions and other price advantages from the seller than at the present time. If Section 2(d) is eliminated, I think large buyers would receive more and greater allowances than they do now. If Section 2(e) was eliminated, I think the large buyers would receive more and greater services and facilities from sellers than at the present time."

In regard to the revision which would assume that the survival of a competitor is not significant to the maintenance of competition, Mr. Hatcher said: "I think the effect of this proposed revision would have little practical effect on the frequency and amount of price discrimination."

On the proposed change which would eliminate the protection for the wholesaler's customers in competition with chain retailers, Mr. Hatcher said: "I think this proposed revision would cause large buyers to receive greater price concessions than they do at the present time."

In regard to the changes proposed for Section 2(f), he stated: "I think this proposed change would have little effect on the demands of the large buyer for

special concessions, but it might cause a few timid buyers (if there are any) of large customers to demand more concessions."

In regard to circumstances which existed prior to 1936 and the possible effect on competition if such practices were permitted today, Mr. Hatcher said: "I know of hardly any circumstances which existed before 1936 which are no longer practiced by buyers and sellers. I think perhaps if the Robinson-Patman Act was repealed, the conscience of many sellers and buyers would become less burdened."

In regard to whether or not he favored the proposed changes and whether or not he favored repealing the Robinson-Patman Act, Mr. Hatcher said: "I do not favor the proposed changes of the act, but I strongly favor the repeal of the whole act because it cannot be enforced any more than prohibition could be. It gives great advantage to the law violator over the very few who strive to comply with the law."

Finally, W. G. Fitzgerald of Y & S Candies, Inc., manufacturer of Brooklyn, N.Y., said: "We favor retention of the Robinson-Patman Act without revision.

"While bigness evolves naturally and expectantly from economic development and consumer affluence, it remains for the small retailer and manufacturer to truly serve the individual differences among a heterogeneous society of some 200 million Americans.

"They alone offer flexibility, convenience, individuality, incentive to change, adaptability, and a stimulus toward the economic satisfaction of consumer needs and wants as they exist in this massively segmented market. They, together with their hundreds of thousands of colleagues, carve out the numerous opportunities left behind or overlooked by the giants, whose sheer size demands large quantity sales.

"Any measures designed to chip away the thinly protective armour of the small businessmen—as the well-financed, Washington lobbyists are intending to do with the proposed revisions—portend of a day not far away when the main thrust of business will be wholly turned inward toward the large investor, rather than the current balance and check system extant between investor and consumer.

"Not everyone wants to buy candy by the pound regardless of its economic justification. Nor can every small or even medium size candy manufacturer convert from an efficient brokerage system to a direct sales force. Nor, too, can the many little retailers stand up to constant pressures from the big fellows, should those pressures gain encouragement by the elimination of the last vestiges of protection at their disposal.

"If today we are to accede completely to the powerful influence exerted by the large enterprise, tomorrow we will do it unconditionally by their dictates. Let the law stand as it is. Allow the piqueing rivalry between bigness and smallness prevail, and we will all remain free men."

We feel that Mr. Fitzgerald's statement is a fitting conclusion to this testimony and we will not add any further comment of our own except to say "thank you" for bearing with us in this lengthy presentation. We hope that it will serve to convince you of the importance that our industry attaches to the preservation and enforcement of the Robinson-Patman Act. While we do not agree with those who assert that this law is not being enforced and should therefore be repealed, we do agree that there are continuing violations which require continual enforcement effort. This is true of any law on the statute books.

We contend that as long as the Robinson-Patman Act is on the books and a diligent effort is made to enforce it, the confectionery industry will be a better industry and that small business will be protected from much of the destructive competition resulting from the existence of the large mass buyers in our distribution system.

APPENDIX

FEDERAL TRADE COMMISSION,
Washington, D.C., March 4, 1970.

Hon. JOHN D. DINGELL,
Chairman, Special Subcommittee on Small Business and the Robinson-Patman Act of the Select Committee on Small Business, House of Representatives, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: It was indeed a pleasure for me to appear before your subcommittee on February 27, to present the unanimous statement of the Federal Trade Commission on our enforcement of the Robinson-Patman Act. I particularly appreciated the very cordial and helpful spirit with which I was received by your subcommittee members.

During my term here at the Federal Trade Commission I look forward to receiving the benefit of the views of your committee on the problems besetting the small businessman and want to assure you of the cooperation of this office in vigorously carrying out our statutory mandate.

In connection with my appearance on February 27, I have noted that you requested that I supply certain materials to the subcommittee. First among these was a letter to the Assistant Secretary for Science and Technology of the United States Department of Commerce concerning the strengthening of flammability standards in light of the recent and tragic nursing home fire in Marietta, Ohio. I am happy to be able to comply with that request by enclosing a letter to Dr. Tribus which contains the unanimous recommendations of the Commission on this matter.

On behalf of the subcommittee, you also made reference to your letter of January 12, 1970, in which you ask us to inform the committee, to the extent proper and appropriate, of the status of certain matters involving automotive warehouse distributors. In my letter of February 2, 1970, on this matter, I noted that the Commission is already looking into the scope and significance of the alleged practices. No separate investigations were therefore deemed necessary.

When I appeared before the committee, you noted that my reply on this matter had not been received. Inasmuch as my letter of February 2 may have been misdirected, I am enclosing a copy.

I also note that the subcommittee was interested in the effect on the Commission of the requirement by the Bureau of the Budget that we request a clearance on all mailings of ten or more questionnaires. On this matter I am informed by the staff that the clearance forms are not burdensome and that the Bureau of the Budget routinely grants the request to make such mailings; therefore, such inconvenience as does exist is minimal.

The documents made available to me which pertain to softwood lumber grading practices have been referred to the staff for study. It may be necessary for Committee and Commission staff members to confer thereon. You may be assured of our full cooperation, and a report on this matter will be furnished to you as soon as is possible.

I hope the above information will be helpful and if I may be of further assistance, please do not hesitate to let me know.

With kind personal regards,
Sincerely,

CASPAR W. WEINBERGER, Chairman.

FEDERAL TRADE COMMISSION,
Washington, D.C., February 26, 1970.

Hon. MYRON TRIBUS,
Assistant Secretary for Science and Technology, Department of Commerce, Washington, D.C.

DEAR DR. TRIBUS: This supplements our letter of January 19, 1970, concerning the proposed flammability standard for carpets and rugs.

In light of the recent and tragic nursing home fire in Marietta, Ohio, and the recent proposed adoption of the Hill-Burton Act flammability test and standards by the Social Security Administration (see New York Times, February 15, 1970, attached), the Commission submits the following additional recommendations which it requests be given consideration.

The Commission urges the Department of Commerce to adopt the Steiner Tunnel Test and the Hill-Burton Act standards, or comparable test and standards, for as many kinds of carpeting as possible. The existence, use, and recent extension of the Steiner Tunnel Test and the Hill-Burton Act standards illustrate that some governmental officials believe that a much stricter standard and a more comprehensive test than the proposed Commerce flammability regulation not only is necessary for the public safety, but is feasible for implementation and enforcement. If the Hill-Burton test and standards, or a similar test and standards, are not practicable for all carpeting sold to the public, then, at a minimum, they should apply to all carpeting intended for use in hospitals and nursing homes and in such areas of all other public facilities where the need is demonstrated.

In light of the Marietta, Ohio, nursing home fire, the Commission is also deeply concerned by the fact that any proposed flammability standard will not apply to carpets and rugs installed and in use by the public before the effective date of any regulation—particularly since many carpets may be expected to last up to twenty years. The Commission would be willing to join with the Department in taking any action necessary to remedy this situation.

For example, the Commission and the Department could issue a joint press release warning users of the hazards of untested carpeting. The Commission and the Department could also work together to formulate a testing procedure for carpets already in use in public buildings, with a view toward possible enforcement action against those who continue to use untested or dangerous carpeting in places of public gathering.

Moreover, to prevent further aggravation of this problem of untested and possibly flammable carpets in use before the proposed standard's effective date, the Commission urges that the Department exercise its authority under Section 4(b) of the Flammable Fabrics Act, as amended, (1) to set the earliest possible effective date for a flammability standard, and (2) to withdraw the exemption for all carpets and rugs in inventory or with the trade as of the date on which the standard becomes effective.

In the event that the Department adopts differing tests or standards for various categories of carpeting, the Commission urges that the Department also require appropriae labels that would reveal the particular test and standard which the carpet or rug passed, and the flammability characteristics which such passage implies. Such a labeling requirement would allow a consumer to purchase a carpet to meet his particular needs as to flammability. For example, a consumer who has a large number of children might wish to purchase carpeting designed for facilities used by the public.

The Commission has also been informed that some proposals have been received suggesting exemption from the standard of small bath mats and throw rugs of less than a particular dimension. We strongly oppose any such exemption. The clear intent of Congress, in enacting the amended law, was that no "interior furnishings" should be exempt from the protection afforded the public against dangerously flammable materials.

By direction of the Commission.

CASPAR W. WEINBERGER, *Chairman.*

[From the New York Times, Feb. 15, 1970]

U.S. UNITS ACT TO CURB CARPET FIRES

By John D. Morris

WASHINGTON.—The Social Security Administration has issued new flammability standards for carpeting in the 4,850 nursing homes that qualify as extended care facilities under the Medicare program.

The action was prompted by a nursing home fire in Marietta, Ohio, that resulted in the deaths of 31 elderly patients last month. Smoke from rapidly burning nylon carpeting was blamed by investigators for the deaths.

The Veterans Administration is considering regulations to guard against such fires in its 166 hospitals.

The outlook for early promulgation of a stiff Federal standard for all rugs and carpets sold in the United States however, is not good.

Samples of carpeting from the Marietta facility passed tests specified by a proposed standard that the Commerce Department published Dec. 18 under the Flammable Fabrics Act of 1967.

STIFFER RULES DOUBTED

Department officials expressed doubts today that the standard would be upgraded before it was put into effect, possibly in the next month or so. They said it was improbable that a stiffer requirement could be justified under the law on the basis of research or investigations so far completed.

The department's interpretation of the law is that no standard may go further than necessary to provide protection against unreasonable risk. And "reasonable" protection must be based on research or investigation, officials said.

Research now under way by the Bureau of Standards is expected to pave the way for replacement of the initial standard with a stiffer one in the future, according to officials.

This research involves tests in a controlled draft with the carpeting exposed to a higher flame than is specified by the pending standard. Tests of the emission of smoke and toxic gases are also being conducted as the possible basis for a future standard.

The Social Security Administration's new regulation for Medicare facilities, transmitted to field inspectors this weekend, is the same as one specified for hospitals receiving Federal grants under the Hill-Burton act. Samples of carpeting from the Marietta home failed the Hill-Burton flammability test.

CODES EXEMPT CARPETING

The Social Security Administration already required nursing facilities qualifying for participation in Medicare to meet state and local safety laws and fire codes. But few if any of those laws and codes apply specifically to carpeting.

A Social Security spokesman said that field inspectors were being instructed to require the removal of any carpeting that failed to meet Hill-Burton requirements.

Present Veterans Administration regulations contain no reference to the flammability of carpeting. Richard G. Bright, the agency's safety and fire protection director, said the standard now under consideration would bar carpeting from bedrooms, hallways and other nursing care areas. Carpeting elsewhere would have to pass the Hill-Burton test.

There is no carpeting in most V.A. hospitals, but in the last few years a number of them have installed it. Mr. Bright said.

Carpeting for nearly all other nonmilitary Federal buildings must meet a standard fixed by the General Services Administration. This standard is slightly less demanding than the one proposed by the Commerce Department under the Flammable Fabrics Act.

Officials of the agency said its standard would soon be brought into line with one now under consideration by the American Society for Testing Materials. The society's proposed standard and that of the Commerce Department are almost identical.

The only difference is that the material must be washed, dry-cleaned or shampooed before testing under the department's proposal. The purpose is to remove any fire-resistant preparation, such as borax, that might temporarily reduce the carpet's flammability.

In the test, known as the Methenamine Pill Test, a burning Methenamine tablet is placed on a sample of carpeting in a draft-free box. If the material burns more than three inches in any direction it fails the test.

The standard is "designed to eliminate from the marketplace carpets and rugs that ignite readily and that propagate flame under draft-free conditions," according to Malcolm W. Jensen, deputy director of the Applied Technology Institute of the National Bureau of Standards.

The Hill-Burton standard calls for what is known as the Steiner Tunnel Test. A test sample is mounted at the mouth of a small furnace and exposed to fire. Observations are made of the time and distance of the flame spread.

A flame-spread rating is then assigned on a scale that rates a noncombustile material as zero and red oak flooring as 100. The rating cannot exceed 75 under the Hill-Burton standard.

Underwriters Laboratories, Inc., tested samples of carpeting from the Marietta Nursing Home, using both the "pill" and the tunnel methods.

In the pill test, flaming did not propagate and the maximum char radius was five-eights of an inch—well within the three-inch limit.

In the tunnel test, flame-spread ratings of 105 and 140 were recorded for two samples from which the sponge rubber backing had been removed. A sample with the backing produced a rating of 275.

With the backing, the carpeting produced three and one-half times as much smoke in four minutes as that generated by red oak flooring in a 10-minute test.

Investigators of the Marietta fire blamed the flammable backing for the thick smoke that asphyxiated the patients. They also expressed belief that the backing was mainly responsible for the rapid spread of the flames.

FEDERAL TRADE COMMISSION,
Washington, D.C., February 2, 1970.

Re : Lynchburg Battery & Ignition Co., et al.

Hon. JOHN D. DINGELL,
*Chairman, Subcommittee on Small Business, and the Robinson Patman Act,
Select Committee on Small Business, House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: This is in further reference to your letter of January 12, 1970, requesting the status (including any investigation conducted) of an application for complaint filed with the Commission on October 10, 1968, against Lynchburg Battery and Ignition Company, Fensky Auto Supply, Motive Parts Warehouse, Inc., National Bushing Co., Ozark Automotive Distributors, Inc., Distributors Warehouse, Inc., and Bapeco Warehouse Company (purporting to act as automotive warehouse distributors) and their suppliers.

The issue presented in this application for complaint evolves from a problem which appears to be industrywide in the automotive replacement parts industry. More specifically, it involves the attempt by a buyer to organize or become part of a purchasing entity in order to receive the lower prices normally offered to customers on a higher level of distribution in the seller's regular distributional program.

Because the Commission already is looking into the scope and significance of the alleged practices, no separate investigations were initiated with relation to the instant application for complaint. I am informed that this problem earlier had been brought to the attention of the staff and the decision not to initiate separate investigations at that time was communicated to the attorney representing the complainants. We anticipate that the questions raised will be resolved promptly.

I hope the above information meets your request, and if I may be of further assistance, please do not hesitate to let me know.

With kind personal regards,

Sincerely,

CASPAR W. WEINBERGER, *Chairman.*

SELECT COMMITTEE ON SMALL BUSINESS,
HOUSE OF REPRESENTATIVES,
Washington, D.C., March 9, 1970.

Hon. CASPAR W. WEINBERGER,
*Chairman, Federal Trade Commission,
Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for sending me the additional material for our record under cover of your letter of March 4. Your appearance before the subcommittee was most helpful. Your attitude of cooperation and candor bode well for your administration at the Commission.

There are, however, several matters that appear to need further particularization. It is my hope that this may be accomplished for the record by this letter and your ensuing reply.

After enumerating the areas to be covered by your proposed study of the Robinson-Patman Act, you stated that

"The Commission has, of course, unique capabilities for conducting such studies and we fully intend to commit adequate staff to this project."

This would seem to imply that it will be an "in house" study. You then stated, however, that

"We shall call on the private bar as well as the academic and business communities to participate and suggest ways of designing the study so as to eliminate institutional bias or predisposition. The latter is a most important factor in studying a subject so highly charged with emotional overtones."

This latter presents several ambiguities upon careful rereading. First, to what extent will the academic and business communities participate? Will this be only to "suggest ways of designing the study", or will their participation be broader? How many members of the private bar, the academic and business communities will participate?

Although it is impossible to ascribe the appropriate degree of concern attached to the following question without answers to the foregoing points, I am sure you will appreciate my interest in seeking assurance that you will see to it that those working with the study from the private sector include supporters of Robinson-Patman as well as those noted for their antagonism toward the Act. Failure to do this was one of the aspects of the ABA report which proved most distressing to the subcommittee.

Your cooperation in replying to these further points is greatly appreciated.

Sincerely,

JOHN D. DINGELL, Chairman.

FEDERAL TRADE COMMISSION,
Washington, D.C., March 16, 1970.

Hon. JOHN D. DINGELL,

Chairman, Subcommittee on Regulatory and Enforcement Agencies, Select Committee on Small Business, House of Representatives, Washington, D.C.

DEAR CHAIRMAN DINGELL: Thank you for your March 9 letter concerning the proposed Robinson-Patman study.

The questions you raised about objectivity and impartiality are the very problems which have most concerned the Commission in our first discussion on how to conduct the study. All Commissioners agree in principle on three essential points: (1) that the study be directed at developing hard factual data and sound policy rather than making still another contribution to the emotionalism which has surrounded this subject; (2) to the extent there is to be outside participation, we should have a representative cross-section of opinions; and (3) the study must be done as quickly as possible.

Within these basic ground rules, we are still considering a definite format. The antitrust bar, as well as the business and academic community are being asked to help suggest the design of the study and questionnaires. We are thinking about contracting with a distinguished, fair, and objective lawyer from the practicing bar or a law school who will help coordinate the study and supervise the staff which undertakes it. Other alternatives are being considered. I will of course let you know as soon as the Commission has settled upon the best way to proceed to achieve the objectives I outlined above.

Thank you again for your courtesy and consideration during my appearance before the Subcommittee.

With kind personal regards,

Sincerely,

CASPAR W. WEINBERGER, Chairman.

U.S. GOVERNMENT,
October 8, 1969.

Memorandum to : Francis C. Mayer, Chief, Division of Discriminatory Practices.
From : Louis R. Sernoff, David F. Shores, attorneys Division of Discriminatory Practices.

Subject : Voting records on Robinson-Patman investigations closed by Commission action since January 1, 1961.

1. Total number of investigations closed by Commission action, 1303
2. Total votes cast by each Commissioner in favor of closing the above investigations:

Dixon -----	1175	Reilly -----	885
Elman -----	1168	Anderson -----	151
MacIntyre -----	1125	Kern -----	54
Jones -----	822	Higginbotham -----	71
Nicholson -----	103		

3. Total votes cast by each Commissioner against closing the above investigations:

Dixon -----	4 MacIntyre -----	36
Elman -----	13 Anderson -----	1

4. 136 investigations were closed by the Secretary, which indicates that no Commissioner objected to the matter being closed.

5. Due to errors or omissions in the filing system, we were unable to ascertain the voting records in 78 matters which had been closed.

In order to expedite this assignment the names of respondents have been omitted in those instances where they were unnecessary to determine the voting record.

Respectfully submitted,

LOUIS R. SERNOFF,
DAVID F. SHORES,

Attorneys, Division of Discriminatory Practices.

ABBREVIATIONS

Ref.—Indicates the volume and page number of Commission Minutes where the voting record appears.

F—Indicates a vote in favor of closing.

A—Indicates a vote against closing.

N/A—Indicates that the voting record was not available, apparently due to error or omission in the Commission's filing system.

C—Indicates final action by Commission.

S—Indicates final action by Secretary.

D—Indicates final action by Director, Bureau of Restraint of Trade.

CPA—Indicates final action by Chief Project Attorney.

NV—Indicates no violation revealed by investigation.

AVC—Indicates acceptance of Assurance of Voluntary Compliance.

Cons.—Indicates consolidation with another file.

APPENDIX A.—MATTERS CLOSED WITHOUT COMMISSION ACTION

611-0173	611-0806	631-0252
0180	0816	0263
0187	0817	641-0027
0192	0866	0039
0201	0890	0916
0202	0892	0252
0203	0934	0280
0204	0963	651-0001
0205	0975	0020
0219	0990	0029
0221	1033	0035
0453	621-0165	0038
0456	0166	0044
0460	0167	0052
0464	0168	0061
0465	0169	0062
0466	0182	0063
0469	0186	0076
0470	0195	0091
0479	0133	0111
0481	0143	0141
0483	0254	0142
0485	0275	0143
0487	0276	0154
0488	0301	0162
0489	0310	0171
0490	0313	661-0048
0491	0314	0061
0493	0316	0079
0494	0903	0111
0495	0906	0142
0496	0916	671-0070
0510	631-0002	0188
0511	0079	0242
0516	0082	681-0051
0517	0096	621-0311
0533	0106	0417
0558	0148	641-0026
0561	0160	0027
0571	0220	0028
0578	0221	0029
0587	0222	0030
0596	0225	0031
0800	0236	0032
0804	0250	0033

APPENDIX B
MATTERS INITIATED BY COMMISSION ACTION

	Reference	Dixon	Elman	Mac- Intyre	Reilly	Jones	Kern	Secrest	Ander- son
Resolution authorizing a non-public investigation of Jos. Schlitz Brewing Co.	112-95	F	F	F		F			
Resolution authorizing a non-public investigation of Cole National Corp. and Independent Lock Co.	112-171	F	F	F	F				
Resolution authorizing a non-public investigation of May Department Stores	112-180	F	F	F	F	F			
Resolution authorizing an investigation of producers, distributors and sellers of LP-gas.	113-518	-----	F	F	F	F			
Resolution authorizing an investigation of advertisers, sellers and shippers of food, drugs, cosmetics and devices	105-527	F	F				F	F	F
Resolution authorizing an investigation of manufacturers, sellers and distributors of tobacco products	106-374	F	F	F			F		F
Resolution authorizing an investigation into the sale and distribution of fresh fruits and vegetables	115-78	F	F	A	F	F			
Resolution authorizing an investigation of distributors and sellers of food products	106-467	F	F	F			F		F
Resolution authorizing an investigation of Eastman Chemical, DuPont, and Firestone Corps.	113-135	F	A	F	F	F			
Resolution authorizing an investigation of the pricing practices of the Weatherhead Co.	112-669	F	F		F	F			
Resolution authorizing an investigation of the publishing industry	106-27	F					F		F
Resolution authorizing an investigation of promotional schemes currently used by food retailers	114-160	F	F	F	F	F			
Resolution directing an investigation into the manufacture, sale and distribution of merchandise sold in department and specialty stores	106-43	F	F	F			F		F

APPENDIX C

MATTERS CLOSED BY CONVENTION ACTON

Respondent	Ref.	File No.	Charge	Commodity	Disposition	Docket	Berman	Mellette	Jones	Rilly	Anderson	Hinginbotham	Kern	Nicholson
binben Syrup & Co., Allen Smith & Co., Johnson Oil & Sandrift Co., Steamer Ocean Co.,	111-481	611 0803	2 (d) (f)	Syrups	Closed-C-Insubstantiality									
	111-158	611 0805		Corn Meal	Closed-C-Insubstantiality									
	111-422	611 0807	"	Grits	Closed-C-Insubstantiality									
	111-67	611 0808	"	Grating Oil	Closed-C-Insubstantiality									
	107-739	611 0810	2 (c)	Food	Closed-C-Insubstantiality									
	114-631	611 0812	"	Fruit	Closed-C-CAVC									
International Produce Distributors, Inc.		611 0814	"	Potatoes	Closed-C-Insubstantiality									
		611 0815	2 (d) (e)	Stationery	Closed-C-INV									
		611 0818	2 (d)	Appliances										
		611 0819	"	Auto Parts										
		611 0821	"	Groceries										
		611 0822	2 (a) (c)	Groceries										
		611 0823	2 (d) (e)	Groceries										
International Gourmet Foods Company		611 0825	"											
		611 0826	"											
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Respondent	Ref.	File No.	Charge	Commodity	Disposition	Dixon	Elman	Hachintrye	Jones	Reilly	Anderson	Hazlethorpe	Kerrn	Nicholson
Thuriges Macaroni Co.	112-76	621 0027	2(d) (e)	Food	Closed-C	"	"	"	"	"	"	"	"	"
J. Acone & Co.	"	621 0028	"	"	"	"	"	"	"	"	"	"	"	"
M. Acone & Son Bean Co.	"	621 0029	"	"	"	"	"	"	"	"	"	"	"	"
West Unibean Elec. Corp.	110-493	621 0030	"	"	"	"	"	"	"	"	"	"	"	"
Cerro Food Products	112-76	621 0031	"	"	"	"	"	"	"	"	"	"	"	"
Great Northern Food Prod.	"	621 0032	"	"	"	"	"	"	"	"	"	"	"	"
Batter Packing Co.	110-493	621 0033	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0034	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0035	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0036	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0037	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0038	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0039	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0040	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0041	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0042	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0043	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0044	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0045	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0046	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0047	"	"	"	"	"	"	"	"	"	"	"	"
110-493	"	621 0048	"	"	"	"	"	"	"	"	"	"	"	"
112-76	"	621 0049	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0050	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0051	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0052	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0053	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0054	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0055	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0056	"	"	"	"	"	"	"	"	"	"	"	"
112-76	"	621 0057	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0058	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0059	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0060	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0061	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0062	"	"	"	"	"	"	"	"	"	"	"	"
110-493	"	621 0063	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0064	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0065	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0066	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0067	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0068	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0069	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0070	"	"	"	"	"	"	"	"	"	"	"	"
110-493	"	621 0071	"	"	"	"	"	"	"	"	"	"	"	"
112-76	"	621 0072	"	"	"	"	"	"	"	"	"	"	"	"
"	"	621 0073	"	"	"	"	"	"	"	"	"	"	"	"
110-493	"	621 0074	"	"	"	"	"	"	"	"	"	"	"	"

Closed-C

Closed-C-No Jurisdiction

Closed-Insubstantiality

Respondent	Ref.	File No.	Charge	Commodity	Disposition	
Universal Publishing & Dist., Corp.	107-56	621-0211	(e) (5)(d)	Publications	Closed-C-Consolidation	
Excellent Publications, Inc.	107-56	621-0214	"	"	Closed-C-Insubstantiality	
Charlton Sports Publishing Corp.	107-56	621-0216	"	"	Closed-C-Insubstantiality	
Official Publishers Inc.	107-59	621-0218	"	"	Closed-C-Consolidation	
Official Manufacturers, Inc.	107-59	621-0219	"	"	Closed-C-Consolidation	
Periodical Base	109-117	621-0220	"	"	Closed-C-Consolidation	
Beat Syndicated Features	107-56	621-0222	"	"	Closed-C-Insubstantiality	
Charlton Comics	107-215	621-0224	"	"	Closed-C-Insubstantiality	
Four Star Comics Group	"	621-0225	"	"	Closed-C-Out of Business	
Harvey Comics Group	107-56	621-0226	"	"	Closed-C-Consolidation	
Marvel Comic Group	107-56	621-0227	"	"	Closed-C-Consolidation	
Belmont Prod., Inc.	111-696	621-0230	"	"	Closed-C-Consolidation	
Univ. of Mich. Press	"	621-0233	"	"	Closed-C-Policy	
Beacon Press	"	621-0234	"	"	"	
"	"	621-0235	"	"	"	
"	"	621-0236	"	"	"	
"	"	621-0237	"	"	"	
"	"	621-0238	"	"	"	
"	"	621-0239	"	"	"	
"	"	621-0240	"	"	"	
"	"	621-0241	"	"	"	
"	"	621-0242	"	"	"	
"	"	621-0243	"	"	"	
"	"	621-0244	"	"	"	
E.I. du Pont de Nemours & Co.	111-696	621-0245	"	"	Closed-C-NV	
Sylvania Electric Prod.	109-355	621-0247	(e) (5)(e)	Chemicals	Closed-C-NV	
Davison Auto Parts	110-140	621-0249	(e) (5)(e)	TV Tubes	"	
Suburban Propane Gas Corp.	109-376	621-0250	(e) (5)	Auto Supplies	Closed-C-No Effect	
A & P Tea Co.	N/A	621-0253	(e) (5)	Gas	Closed-C-Policy	
Wim-Bixie Stores	N/A	621-0254	(e) (5)	Maritime	Closed-C-NV	
Colonial Stores	N/A	621-0255	(e) (5)	Food	Closed-C-NV	
Giant Food	N/A	621-0256	(e) (5)	"	"	
Biddle Purchasing Co.	N/A	621-0257	"	"	"	
Topco Associates	N/A	621-0258	"	"	"	
Quaker Optical Co.	N/A	621-0259	"	"	"	
Ottendorfer's Bakeries	116-263	621-0262	(e) (5)	Classes	AUC 1068	
Stevens' Nobil Biscuit Co.	111-273	621-0268	(e) (5)	Bread	Closed-C-No Effect	
Stevens' Nobil Biscuit Co.	111-274	621-0269	(e) (5)	Candy	AUC	
March Food Ind.	111-279	621-0271	(e) (5)	Cans	Closed-C-NV	
Daggett & Ramsdell	N/A	621-0273	(e) (5)	Film	Closed-C-Consolidation	
All Publications, Inc.	107-551	621-0278	(e) (5)	Printed	AUC	
Hansen Baking Co.	N/A	621-0279	(e) (5)	Publications	Closed-C-Out of Business	
J. A. Wilson	114-413	621-0281	(e) (5)	Tobacco	Closed-C-NV	
Morgan Adhesives	112-510	621-0282	(e) (5)	Adhesive	Closed-C-Out of Business	
McKesson & Robbins	112-63	621-0283	(e) (5)	Drugs	Closed-C-NV	

Respondent	Ref.	File No.	Charge	Commodity	Disposition	Dixon	Ethan	MacIntyre	Jones	Reilly	Anderson	Higinbotham	Korn	Nicholson
Lamp Fashion, Inc.	110-601	631.0029	2 (d) (e)	Clothing	Closed-C-Insubstantiality	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Mandel Mfg. Co.	109-505	631.0035	2 (d)	"	Closed-C-Out of Business	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Nicole Sportswear, Inc.	109-505	631.0041	"	"	Closed-C-Out of Business	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Oriksente, Inc.	109-505	631.0042	"	"	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Pandora Kitewear, Inc.	109-505	631.0043	"	"	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Rene Leatherware, Inc.	109-509	631.0047	"	"	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Rob Roy Co., Inc.	110-496	631.0048	"	"	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Ship N Shore, Inc.	110-496	631.0054	"	"	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Tatua Paiges Fashions, Inc.	110-505	631.0055	"	"	Closed-C-Out of Businesses	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Colonial Baking Co., of Nonagon, PA	110-817	631.0057	2 (c)	"	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
E. B. Bassett, Inc.	111-145	631.0065	2 (c) (e)	Food	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
W. B. Bassett, Inc.	111-145	631.0066	2 (c)	Dairy Products	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
All Star Dartboard, Inc.	111-157	631.0068	2 (c) (f)	Dairy Supplies	Closed-C-No Effect	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Bensis Bros. Bag Co.	107-442	631.0070	2 (c)	Bags	Closed-C-Proceeding By D.J.	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Sherrell Furniture Co.	N/A	631.0071	2 (a) (c)	Furniture	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Speciale's Sugar Co.	N/A	631.0072	2 (c)	Sugar	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Holly Sugar Co.	111-474	631.0073	2 (c) (d)	"	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Colorado Potato Growers Exchange	111-477	631.0077	2 (c)	Food	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Grover-Schipper Potato Co.	114-135	631.0078	2 (c)	Dairy Products	Closed-C-Consolidation	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Beatrice Foods Co.	N/A	631.0081	2 (a)	Food	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Pacific Merchantile Co.	110-568	631.0083	2 (c)	Peat	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Wilson & George Meyer & Co., American Chain & Cable Co.	110-568	631.0086	2 (c)	Auto Parts	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Mark Bros., Inc.	N/A	631.0088	2 (a)	Food	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
E. R. Moore Co.	N/A	631.0089	"	Clothing	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Ad-Carts Inc.	112-562	631.0092	2 (c) (e)	Food	Closed-C-Tract. Aband.	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Beverly Farms Dairies	115-295	631.0093	2 (c) (d) (e)	Milk	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Vender Co.	N/A	631.0094	2 (c) (d)	Nutches	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Chinatown Sardines Co.	110-684	631.0095	2 (c)	Toys	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Chemcraft Publishers	114-649	631.0098	2 (a)	Stationery	A/C 585	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Family Bargain Centers	111-298	631.0103	2 (a)	Clothing	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Atlantic Steel Co.	N/A	631.0107	2 (a) (c)	Steel	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
National Luggage Dealers Ass'n	N/A	631.0109	2 (a) (d)	Luggage	A/C 66	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Major Magazines	110-615	631.0110	2 (a)	Publications	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
American Beauty Macaroni Co., Rayette, Inc.	112-231	631.0113	2 (a)	Food	Closed-C-Policy	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
La Mar, Inc.	112-231	631.0114	2 (a)	Cosmetics	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
New England Confectionery Co., Stillwell Canning Co.	112-231	631.0116	2 (a)	Confectionery	Closed-C-Policy	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Zester Foods, Inc.	112-231	631.0117	"	Food	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Conde Nast Publications	110-45	631.0118	"	Publications	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Digest Productions Corp.	110-617	631.0123	"	"	Closed-C-Out of Businesses	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Kanthill Corp.	112-209	631.0124	"	Heaters	A/C	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Jas-Sun Brakeage Co., Electra & Brakes, Inc.	105-240	631.0129	2 (c)	Food	Closed-C-NV	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Cartron Hall, Inc.	111-507	631.0155	2 (c) (d)	Calendars	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex
Cartron Hall, Inc.	111-552	631.0156	2 (c) (d)	Milk	"	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex	Ex

Ref.	File No.	Charge	Commodity	Disposition	Dixon	Eiman	Hartley	Jones	Reilly	Anderson	Binghamham	Kern	Nicholson
I. Milk													
Sea Cola Bottling Co., c/f Cameron	NA-1.537	2(a) 109-1.56	Milk	Closed-C-NV									
Sea Cola Bottling Co. of Bryon	631.0158	2(a) 169-1.54	Beverages	Closed-C-No Jurisdiction									
S. Dillon	631.0159	2(a) 112-2.59	Beverages	Closed-C-NV									
Weyer	631.0169	2(a) 112-2.59	Milk	Closed-C-NV									
H. P. Fair	631.0170	2(a) 112-2.59	Milk	Closed-C-No Jurisdiction									
Ford Fair Bargainette Co.	631.0171	2(a) 112-2.59	Milk	Closed-C-No Jurisdiction									
Good Shepherd Products Co.	631.0172	2(a) 112-3.95	Milk	Closed-C-No Jurisdiction									
Stephens Bakery Co., Albuquerque	631.0176	2(a) NA	Margarine	Closed-C-NV									
"	631.0177	2(a) 112-2.31	Urns/	AVC 1319									
"	631.0179	2(d)	Bakery	Closed-C-Policy									
"	631.0180	2(d)	"	"									
"	631.0182	2(d)	"	"									
"	631.0184	2(d)	"	"									
Boatright's Bakery	631.0185	2(d)	"	"									
Boatright's Bakery	631.0186	2(d)	"	"									
Boatright's Bakery	631.0187	2(d)	Bakery Prod.	Closed-C-Policy									
Boatright's Bakery	631.0188	2(d)	"	"									
Boatright's Bakery	631.0189	2(d)	"	"									
Boatright's Bakery	631.0190	2(d)	"	"									
Boatright's Bakery	631.0191	2(d)	"	"									
Boatright's Bakery	631.0192	2(d)	"	"									
Boatright's Bakery	631.0193	2(d)	"	"									
Boatright's Bakery	631.0194	2(d)	"	"									
Boatright's Bakery	631.0195	2(d)	"	"									
Boatright's Bakery	631.0196	2(d)	Fruit	E&BS									
Boatright's Bakery	631.0197	2(d)	"	"									
Boatright's Bakery	631.0198	2(d)	Beverages	Fond									
Boatright's Bakery	631.0199	2(d)	"	"									
Boatright's Bakery	631.0200	2(d)	"	"									
Boatright's Bakery	631.0201	2(d)	"	"									
Boatright's Bakery	631.0202	2(d)	"	"									
Boatright's Bakery	631.0203	2(d)	"	"									
Boatright's Bakery	631.0204	2(d)	"	"									
Boatright's Bakery	631.0205	2(d)	Cosmetics	Cosmetics									
Boatright's Bakery	631.0206	2(d)	"	"									
Boatright's Bakery	631.0207	2(d)	Food	"									
Boatright's Bakery	631.0208	2(d)	Food	"									
Boatright's Bakery	631.0209	2(d)	Waste Baskets	"									
Boatright's Bakery	631.0210	2(d)	Beverages	"									
Boatright's Bakery	631.0212	2(d)	"	"									
Boatright's Bakery	631.0213	2(d)	"	"									
Boatright's Bakery	631.0214	2(d)	"	"									
Boatright's Bakery	631.0223	2(d)	"	"									
Boatright's Bakery	631.0224	2(d)	"	"									
Boatright's Bakery	631.0225	2(d)	"	"									
Boatright's Bakery	631.0226	2(d)	"	"									
Boatright's Bakery	631.0227	2(d)	"	"									
Boatright's Bakery	631.0228	2(d)	"	"									
Boatright's Bakery	631.0229	2(d)	"	"									
Boatright's Bakery	631.0230	2(d)	"	"									
Boatright's Bakery	631.0231	2(d)	"	"									
Boatright's Bakery	631.0232	2(d)	"	"									
Boatright's Bakery	631.0233	2(d)	"	"									
Boatright's Bakery	631.0234	2(d)	"	"									
Boatright's Bakery	631.0235	2(d)	"	"									
Boatright's Bakery	631.0236	2(d)	"	"									
Boatright's Bakery	631.0237	2(d)	"	"									
Boatright's Bakery	631.0238	2(d)	"	"									
Boatright's Bakery	631.0239	2(d)	"	"									
Boatright's Bakery	631.0240	2(d)	"	"									
Boatright's Bakery	631.0241	2(d)	"	"									
Boatright's Bakery	631.0242	2(d)	"	"									
Boatright's Bakery	631.0243	2(d)	"	"									
Boatright's Bakery	631.0244	2(d)	"	"									
Boatright's Bakery	631.0245	2(d)	"	"									
Boatright's Bakery	631.0246	2(d)	"	"									
Boatright's Bakery	631.0247	2(d)	"	"									
Boatright's Bakery	631.0248	2(d)	"	"									
Boatright's Bakery	631.0249	2(d)	"	"									
Boatright's Bakery	631.0250	2(d)	"	"									
Boatright's Bakery	631.0251	2(d)	"	"									
Boatright's Bakery	631.0252	2(d)	"	"									
Boatright's Bakery	631.0253	2(d)	"	"									
Boatright's Bakery	631.0254	2(d)	"	"									
Boatright's Bakery	631.0255	2(d)	"	"									
Boatright's Bakery	631.0256	2(d)	"	"									
Boatright's Bakery	631.0257	2(d)	"	"									
Boatright's Bakery	631.0258	2(d)	"	"									
Boatright's Bakery	631.0259	2(d)	"	"									
Boatright's Bakery	631.0260	2(d)	"	"									
Boatright's Bakery	631.0261	2(d)	"	"									
Boatright's Bakery	631.0262	2(d)	"	"									
Boatright's Bakery	631.0263	2(d)	"	"									
Boatright's Bakery	631.0264	2(d)	"	"									
Boatright's Bakery	631.0265	2(d)	"	"									
Boatright's Bakery	631.0266	2(d)	"	"									
Boatright's Bakery	631.0267	2(d)	"	"									
Boatright's Bakery	631.0268	2(d)	"	"									
Boatright's Bakery	631.0269	2(d)	"	"									
Boatright's Bakery	631.0270	2(d)	"	"									
Boatright's Bakery	631.0271	2(d)	"	"									
Boatright's Bakery	631.0272	2(d)	"	"									
Boatright's Bakery	631.0273	2(d)	"	"									
Boatright's Bakery	631.0274	2(d)	"	"									
Boatright's Bakery	631.0275	2(d)	"	"									
Boatright's Bakery	631.0276	2(d)	"	"									
Boatright's Bakery	631.0277	2(d)	"	"									
Boatright's Bakery	631.0278	2(d)	"	"									
Boatright's Bakery	631.0279	2(d)	"	"									
Boatright's Bakery	631.0280	2(d)	"	"									
Boatright's Bakery	631.0281	2(d)	"	"									
Boatright's Bakery	631.0282	2(d)	"	"									
Boatright's Bakery	631.0283	2(d)	"	"									
Boatright's Bakery	631.0284	2(d)	"	"									
Boatright's Bakery	631.0285	2(d)	"	"									
Boatright's Bakery	631.0286	2(d)	"	"									
Boatright's Bakery	631.0287	2(d)	"	"									
Boatright's Bakery	631.0288	2(d)	"	"									
Boatright's Bakery	631.0289	2(d)	"	"									
Boatright's Bakery	631.0290	2(d)	"	"									
Boatright's Bakery	631.0291	2(d)	"	"									
Boatright's Bakery	631.0292	2(d)	"	"									
Boatright's Bakery	631.0293	2(d)	"	"									
Boatright's Bakery	631.0294	2(d)	"	"									
Boatright's Bakery	631.0295	2(d)	"	"									
Boatright's Bakery	631.0296	2(d)	"	"									
Boatright's Bakery	631.0297	2(d)	"	"									
Boatright's Bakery	631.0298	2(d)	"	"									
Boatright's Bakery	631.0299	2(d)	"	"									
Boatright's Bakery	631.0300	2(d)	"	"									
Boatright's Bakery	631.0301	2(d)	"	"									
Boatright's Bakery	631.0302	2(d)	"	"									
Boatright's Bakery	631.0303	2(d)	"	"									
Boatright's Bakery	631.0304	2(d)	"	"									
Boatright's Bakery	631.0305	2(d)	"	"									
Boatright's Bakery	631.0306	2(d)	"	"									
Boatright's Bakery	631.0307	2(d)	"	"									
Boatright's Bakery	631.0308	2(d)	"	"									
Boatright's Bakery	631.0309	2(d)	"	"									
Boatright's Bakery	631.0310	2(d)	"	"									
Boatright's Bakery	631.0311	2(d)	"	"									
Boatright's Bakery	631.0312	2(d)	"	"									
Boatright's Bakery	631.0313	2(d)	"	"									
Boatright's Bakery	631.0314	2(d)	"	"									
Boatright's Bakery	631.0315	2(d)	"	"									
Boatright's Bakery	631.0316	2(d)	"	"									
Boatright's Bakery	631.0317	2(d)	"	"									
Boatright's Bakery	631.0318	2(d)	"	"									
Boatright's Bakery	631.0319	2(d)	"	"									
Boatright's Bakery	631.0320	2(d)	"	"									
Boatright's Bakery	631.0321	2(d)	"	"									
Boatright's Bakery	631.0322	2(d)	"	"									
Boatright's Bakery	631.0323	2(d)	"	"									
Boatright's Bakery	631.0324	2(d)	"	"									
Boatright's Bakery	631.0325	2(d)	"	"									
Boatright's Bakery	631.0326	2(d)	"	"									
Boatright's Bakery	631.0327	2(d)	"	"									

Respondent	Ref.	File No.	Charge	Commodity	Disposition	Dixon	Elman	Hagan	Harrison	Kern	Michelson
						Jones	Reilly	Anderson	Harrison	Kern	Michelson
Bobby McLean & Libby Sweetened Canned Bacon	114-523	641 0234	2(a)	Food	Closed-C-NV	F	F	F	F	F	F
Burnham Gas 6 F. Feiger Master & Sons Arch & Co., Inc.	111-568	641 0240	2(b)	Gas	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	111-568	641 0244	2(d)	Jewelry	Closed-C-NV	F	A	F	F	F	F
Burnett & Sons	111-568	641 0245	2(d)	Jewelry	Closed-C	F	A	F	F	F	F
Burnett & Sons	111-568	641 0246	"	"	"	F	A	F	F	F	F
Burnett & Sons	113-597	641 0247	2(a) (t)	Chains	AVC 453	F	A	F	F	F	F
Burnett & Sons	114-524	641 0248	2(a)	Cosmetics	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	114-525	641 0257	2(a)	Bakery	Closed-C-Insubstantiality	F	F	F	F	F	F
Burnett & Sons	111-308	641 0260	2(a) (d) (e)	Beverages	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	118-346	641 0264	2(a)	Cosmetics	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	116-511	641 0270	"	Auto Parts	Closed-C-Practice Abandoned	F	F	F	F	F	F
Burnett & Sons	112-273	641 0279	"	Auto Parts	Closed-C-Private Controversy	F	F	F	F	F	F
Burnett & Sons	117-143	641 0284	"	Auto Parts	AVC	F	F	F	F	F	F
Burnett & Sons	111-473	641 0284	"	Food	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	113-686	641 0287	2(a) (e)	Auto Parts	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	114-385	641 0289	2(a)	Gas	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	115-376	651 0012	2(c)	Fault	Closed-C-Consolidation	F	F	F	F	F	F
Burnett & Sons	117-119	651 0016	2(c)	Auto Parts	Closed-C-NV	F	A	F	F	F	F
Burnett & Sons	114-700	651 0043	2(c)	Milk	Closed-C-NV	F	A	F	F	F	F
Burnett & Sons	113-750	651 0046	2(a)	Machine Tools	Closed-C-AVC	F	A	F	F	F	F
Burnett & Sons	117-22	651 0050	2(a)	Paper Plates	Closed-C-AVC	F	A	F	F	F	F
Burnett & Sons	114-413	651 0051	2(a) (d) (e)	Stationery	Closed-C-Policy	F	F	F	F	F	F
Burnett & Sons	112-8	651 0065	2(d)	Clothing	Closed-C-Consolidation	F	F	F	F	F	F
Burnett & Sons	112-156	651 0068	2(d)	Clothing	Closed-C-AVC	F	F	F	F	F	F
Burnett & Sons	112-154	651 0069	"	Milk	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	117-143	651 0071	2(a)	Confectionery	Closed-C-AVC	F	F	F	F	F	F
Burnett & Sons	112-421	651 0077	2(a)	Frozen Food	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	114-421	651 0078	2(a) (d)	Auto Glass	Closed-C-AVC	F	F	F	F	F	F
Burnett & Sons	113-659	651 0081	"	Auto Glass	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	118-439	651 0093	2(c)	Plumbing Supplies	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	118-439	651 0095	2(c) (e)	Plumbing Supplies	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	113-601	651 0101	2(d)	Milk	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	118-624	651 0102	"	Dry Ice	Closed-C-AVC	F	F	F	F	F	F
Burnett & Sons	114-157	651 0112	2(c) (d) (e)	Macaroni	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	113-683	651 0125	"	Salad Dressings	Closed-C-No Jurisdiction	F	F	F	F	F	F
Burnett & Sons	113-683	651 0125	"	Insecticides	Closed-C-AVC	F	F	F	F	F	F
Burnett & Sons	118-156	651 0136	2(a) (e)	Milk	Closed-C-NV	F	F	F	F	F	F
Burnett & Sons	115-695	651 0140	2(a) (c) (e)	Road Supplies	Closed-C-No Jurisdiction of Business	F	F	F	F	F	F
Burnett & Sons	N/A	651 0160	2(c) (d) (e)	Official Goods	Closed-C-No Jurisdiction of Business	F	F	F	F	F	F
Burnett & Sons	N/A	651 0161	2(c)	Bakery Supplies	Closed-C-Insubstantiality	F	F	F	F	F	F
Burnett & Sons	N/A	651 0163	2(a)	Milk	Closed-C-Insubstantiality	F	F	F	F	F	F
Burnett & Sons	116-533	661 0013	2(b)	Building Materials	Closed-C-Insubstantiality	F	F	F	F	F	F
Burnett & Sons	N/A	661 0014	2(e) (d) (e)	Paints	Closed-C-Insubstantiality	F	F	F	F	F	F
Burnett & Sons	N/A	661 0018	2(e)	Milk	Closed-C-AVC	F	F	F	F	F	F

Advisory Opinion Digest No.	Subject	Commission Vol. Page	Date of Minute Page	Date of Digest	
2	Toy Catalog, independently published; advertising in by toy manufacturer.	111 - 11	9/29/64	10/30/64	F
3	Toy Catalog, independently published; advertising in by toy manufacturer.	112 - 359	10/7/65	10/12/65	F
6	Three-way promotional program; out door advertising.	112 - 303	9/21/65	11/23/65	AB
7	Drug Catalog; independently published; advertising in by manufacturer.	111 - 546	4/14/65	11/23/65	F
10	Advertising allowance; alternatives for customers unable to use preferred media.	112 - 516	11/30/65	12/9/66	F
12	Advertising allowance granted to one customer only.	112 - 588	12/16/65	1/5/66	F
16	Drug Catalog, independently published; advertising in by manufacturer.	112 - 298,99	9/21/65	3/16/66	AB
19	Promotion addressed to new mothers; redeemable coupons.	113 - 144,45	5/15/66	3/24/66	F
23	Establishment of buying corporation by broker and a plan to share brokerage.	112 - 161	7/15/65	4/1/66	F
24	Three-way proportional program; check stands as a basis for proportionality.	107 - 542,43	10/24/62	4/1/66	F 1/
26	Advertising allowances based on annual volume of purchases.	113 - 198,99	3/29/66	4/8/66	F 2/
31	Rebate pricing, photocopying through advertising agencies.	108 - 20	12/13/62	4/13/66	F
32	Unilateral advertising by seller; distance between customers.	107 - 363	9/4/62	4/15/66	F
34	Three-way promotional program, sales message announcing device.	108 - 30	12/18/62	4/23/66	F
35	Three-way promotional programme, recipes, selected areas.	108 - 163	2/5/63	4/23/63	F
36	Functional Discounts; meeting competition.	108 - 291	3/14/63	4/26/66	F D
38	Advertising allowance based on purchase volume.	107 - 514	10/10/62	4/29/66	F
39	Advertising allowance as proportionalized as between competing customers.	107 - 514	10/10/62	4/30/66	F

1/ For minute record only Commissioner McIntyre expressed some doubt whether first sentence in last paragraph was appropriate.

2/ For minute record not participate.

Advisory Opinion Digest No.	Subject	Commission Vol. Page	Date of Minute Page	Date of Disease	Comments Letter Name
41	Mail order sales; additional discounts.	108 - 218,19	2/21/63	5/10/66	F
42	Advertising service disclosing where subscribers products are sold.	108 - 361	4/2/63	5/10/66	F
43	Like grade and quality.	108 - 75	1/8/63	5/11/66	F
48	License and sub-license selling to competing jobbers.	108 - 559, 60	5/28/63	5/19/66	AB
49	Cooperative advertising agreement, no ceiling on payments.	108 - 558	5/28/63	5/20/66	AB
50	Three-way promotional program; projectors in grocery outlets.	108 - 571	6/4/63	5/20/66	F
51	Three-way promotional program; discount stamp advertising plan.	109 - 220	9/12/63	6/12/66	F
52	Three-way promotional program; manufacturer to retailer display kit.	108 - 594	6/6/63	6/1/66	F
53	Three-way promotional program; self-locating shopping guide.	109 - 10,11	7/2/63	6/1/66	AB
54	Publisher promotional assistance for newsstands.	113 - 398	5/25/66	6/11/66	F
56	Three-way promotional program; newsstand display card drawing attention to advertising in magazines.	109 - 246	9/18/63	6/16/66	F
57	Three-way promotional advertising-lottery merchandising; grocery bag bearing advertising and prize-winning number.	109 - 555	12/12/63	6/16/63	F
62	Three-way promotional program; suppliers and grocery chain exhibition, in-store promotion.	109 - 672	1/21/64	6/21/66	F
65	Three-way promotional program, broadcast of supplier commercials in retail stores.	110 - 364,65	5/19/64	6/25/66	F
66	Publisher promotional assistance for newsstands.	110 - 451	6/16/64	6/25/66	AB
67	Functional discount to premium book jobbers.	110 - 526	7/9/64	6/28/66	F
74	Three-way promotional program, In-store music with supplier commercials.	111 - 141	11/18/64	7/22/66	D
75	Publisher promotional assistance for magazine dealers.	111 - 261	1/5/65	7/21/66	F
77	Three-way promotional supplier programs for competing marketing area retailers.	112 - 286	9/14/65	8/2/66	F
88	Three-way promotional program by radio station financed by suppliers and retailers.	113 - 619	7/25/66	9/14/66	D

Adv. Advisory Opinion	Digest No.	Subject	Commission Vol. Page	Date of Minute	Date of Digest	
89	Three-way recipe promotional program, "fullcover"	Publisher promotional assistance for "fullcover" display.	113 - 592	7/19/66	9/14/66	F 1/ F
90	Three-way promotional program, supplier advertising where product available locally.	113 - 622	7/26/66	9/21/66	F F F	
92	Three-way promotional program, shopping cart advertising, proportionally equal treatment.	113 - 695	9/7/66	10/13/66	F F F AB	
94	Three-way brand name promotion through recipe cards.	113 - 662, 64	9/6/66	10/18/66	F D 2/ F	
101	Three-way in-store promotional program.	114 - 133, 34	10/25/66	11/11/66	F F F	
103	Three-way promotional payments granted on basis of floor space: lottery merchandising, "lucky" number flashed on screen.	114 - 153	10/26/66	1/7/67	F 4/ F F F	
106	Functional discounts offered purchasing manufacturers.	114 - 271	12/13/66	2/2/67	F F D 5/ F	
111	Retail discount selling organization	114 - 337	1/10/67	2/2/67	F F D	
114	Reduced advertising rates to buyers of media combination.	114 - 414	2/7/67	3/1/67	AB-D 6/ AB	
118	Propriety of publishing list prices for different marketing areas.	114 - 493	3/20/67	3/28/67	F AB F AB	
122	Acceptance of free merchandise by grocery retailer.	114 - 586, 97	4/12/67	4/22/67	F F F F	
131	Giving free merchandise to obtain new customers.	115 - 62	6/6/67	6/27/67	F F F F	
132	Three-way brand name promotion through contest books.	115 - 70	6/12/67	6/27/67	F F F F	
135	Advertising allowances by book publisher.	115 - 126	7/27/67	7/19/67	F F F F	
140	Promotional allowances by fabric supplier.	115 - 293	9/19/67	8/30/67	F F F F	
143	Aggregating purchases of multi-unit organizations for discount purposes.	115 - 313	9/19/67	9/12/67	F F F F	
145	"Back-haul" allowance to customers picking up their own order.	115 - 365, 66	9/27/67	10/17/67	F F F F	
147	Trade association publication for use by members featuring range of prices to be charged customers.	115 - 371, 72	9/27/67	10/24/67	F F F F	
150	Additional discounts on purchases above specified annual volume.	115 - 460, 61	10/26/67	11/21/67	F D F F	
151	Discount based on percentage of increase in annual purchase volume.	115 - 520	11/21/67	12/8/67	F F F F	
153	Compliance with state milk marketing order fixing minimum resale prices.	115 - 568	12/7/67	12/19/67	F F F NP	
154	Distributor recruitment through grant of override bonus.	115 - 568, 69	12/7/67	12/22/67	F F F NP	
155	Wanted letter sent by Staff, not Commission.	115 - 572	12/7/67	12/29/67	F F F NP	

- 1/ Not participate for minute record.
 2/ Not participate for minute record.
 3/ Dissent for minute record only in one aspect of matter.
 4/ Wanted letter sent by Staff, not Commission.
 5/ Dissent for minute record.
 6/ Not concur for minute record.

Subject	Commission Vol. Page	Date of Minute Page	Date of Minute	Date of Digest
Advertising allowances for customers in selected trading areas.	115 - 571,72	12/7/67	1/4/68	P
Dealer policy of not selling to retailers who advertise "sale", "close out", "bargain" or "clearance" prices.	115 - 579	1/11/68	1/31/68	P
Inform delivery price obtained by deducting freight allowance from fob price.	116 - 35,37	1/31/68	2/24/68	P
Notification of display allowance program by advertisement in trade publication of general circulation.	116 - 78	2/9/68	2/24/68	P
Truckload discount for quantity purchases.	116 - 35,37	1/31/68	3/5/68	P
Availability of resale competition as determinants of distribution levels.	116 - 97	2/14/68	3/14/68	P
Extended credit terms for newly established retail stores in impoverished urban areas.	116 - 378,79	5/2/68	5/28/68	P
Promotional assistance program limited in area and in value.	116 - 346	4/25/68	6/11/68	P
Price differences between competing 'stock-taking' and "non-stocking" dealers.	116 - 505	6/11/68	2/2/68	P
Proposal to grant special discounts for stocking, quantity orders and cumulative purchases.	116 - 516,18	6/11/68	7/9/68	P 1/
Pooling of promotional allowances by retailers.	116 - 433	6/16/68	7/9/68	D
Merchandising plan to offer smaller volume customer smaller discounts.	116 - 516,17	6/11/68	7/9/68	D
Trade association plan to secure uniform discounts from suppliers and establish uniform clearance sales and alteration costs for retailers.	116 - 345,46	6/18/68	7/7/68	D 2/
Receipt of promotional allowance without concurrent availability to competitors.	116 - 591	7/2/68	8/17/68	P
Promotional program involving "cents off" coupons and demonstrators.	117 - 169,70	10/2/62	10/22/68	P

1/ Dissent as to functional discounts.
2/ Commissioner Nicholson changed his mind.

Advisory Opinion Digest No.	Subject	Commission Minute Vol. Page	Date of Minute	Date of Digest
304	Three-party promotional program under investigation. Below-cost pricing limiting provision in cooperative advertising.	117 - 179, 80 117 - 222, 73	10/4/68 10/29/68	10/22/68 11/21/68
309	Three-party promotional program, sale of TV advertising time to suppliers of products sold through grocery stores.	117 - 294, 95	11/5/68	12/20/68
312	Advertising by manufacturers in an independently published periodical.	117 - 394, 55	11/27/68	1/17/69
314	Supplier advertising in an independently published periodical.	117 - 508, 10	1/7/69	2/7/69
322	Organization of warehouse distributing center for jobber buying group.	117 - 572, 73	1/31/69	3/4/69
328	Manufacturer wholesaler relationships; different discounts.	117 - 648, 49	2/18/69	4/18/69
333	Promoter's responsibility in tripartite promotional assistance plan.	118 - 173 118 - 314, 15 118 - 430	4/3/69 5/7/69 6/3/69	5/5/69 7/10/69 7/11/69
346	Tripartite promotional plan in grocery field.	118 - 441	6/4/69	7/11/69
354	Tripartite promotional plan in grocery industry.	118 - 556	6/20/69	9/24/69
356	Supplier Services furnished through third party.	119 - 48	7/31/69	Unavailable
357	Pricing of replacement glass for automobiles.	116 - 299, 300	4/17/68	5/7/68
363	Tripartite promotional advertising plan.			
367	Discount in lieu of brokerage by wholesale food distributor.			
243				

Key

- F (In favor of)
 D (Dissent)
 NP (Not Participate)
 C (Concur)
 AB (Absent)

1/ Present but no mention of vote.

* This chart contains votes of Federal Trade Commissioners for all published advisory opinion digests dealing with the Robinson-Patman Act. With regard to these votes it should be noted that until July 6, 1967, the vote of each Commissioner was not shown in the minute unless it was so directed. Thus, prior to July 6, 1967, if a Commissioner was present at a meeting and he did not state his objection, it was assumed he voted in the affirmative on each such issue. Subsequent to July 6, 1967 the vote of each Commissioner were usually shown. In addition, it should be noted that the product involved in each opinion does appear as the Commission does not usually publish the product or the name of the applicant.

Votes of Commissioners on Trade Practice Rules Containing Robinson-Patman Provisions-- Since 1961.

No. of Rule	Subject of Rule	Minute Date	Federal Register Date	Commission Minute Vol.	Commission Page
35	Wall Coverings Industry	6/26/62	6/30/62	107 -	233
36	Poultry Hatching & Breeding Industry	2/7/61	2/22/61	105 -	290
51	Fluorocarbons Industry	12/6/60	1/11/61	105 -	168
56	Pleasure Boat Industry	7/27/61	8/4/61	106 -	13
57	Residential Aluminum Sliding Industry	3/12/62	4/6/62	106 -	587
60	Metallic Watch Band Industry	6/26/62	6/30/62	107 -	233
61	Stationers Industry	5/29/62	6/15/62	107 -	146
65	Kosher Food Products & Kosher Products Industry	9/10/62	9/19/62	107 -	399
66	Wire Rope Industry	12/13/62	1/11/63	108 -	16
67	Phonograph Record Industry	9/14/64	10/9/64	110 -	677
74	Fresh Fruit & Vegetable Industry	3/24/65	4/15/65	111 -	466
75	Household Furniture Industry	11/26/63	12/18/63	109 -	486
105	Tobacco Distributing Industry	6/26/62	6/30/62	107 -	227
118	Mirror Industry	6/26/62	6/30/62	107 -	226
154	Luggage and Related Products Industry	6/19/62	6/30/62	107 -	227
192	Optical Products Industry	6/26/62	6/30/62	-	-
214	Hearing Aid Industry	6/30/62	7/20/65	112 -	102
221	Cosmetic & Toilet Preparations Industry	6/23/66	7/1/66	113 -	512
4/	Push Money Rule	4/25/62	4/25/62	107 -	18

Key

F (In favor)
 D (Dissent)
 C (Concur)
 AB (Absent)
 NP (Not Participate)

- 1/ In favor of, except for rule 2.
 2/ Concur on condition Commission Defer below cost sales proviso.
 3/ For minute record, Anderson not in favor of third paragraph of rule 3 and MacIntyre was not in favor of second sentence of third paragraph of rule 3.
 4/ Record confusing, appears Commissioner was in favor of overall Trade Practice Rule put against a particular amendment to it.

<u>Subject of Rule</u>	<u>Commission Minute Vol. Page</u>	<u>Adoption; Date of Minute</u>	<u>Promulgation</u>	<u>Effective Date</u>
Discriminatory Practices in Men's and Boys' Tailored Clothing Industry.	115 - 446-47	10/18/67	11/9/67	4/1/68

Key

F (In favor)
 D (Dissent)
 C (Concur)
 AB (Absent)
 NP (Not Participate)

Published Commission Guides Containing Some Reference To The Robinson-Patman Act.

<u>Guide Subject</u>	<u>Commission Minute Vol. Page</u>	<u>Adoption; Date of Minute</u>	<u>Date of Promulgation</u>	<u>Effective Date</u>
Guides for the Beauty & Barber Equipment and Supplies Industry.	116 - 670-71	7/11/68	8/23/68	10/25/68 F F E
Guides for the Greeting Card Industry.				F F
Relating to Discriminatory Practices.	117 - 236	10/22/68	11/15/68	10/18/68 F F E
Guides for Ladies Handbag Industry.	118 - 456-57	6/4/69	6/27/69	8/25/69 F F E
Proposed Guides For Discriminatory Practices In The Toy Industry. ^{2/}				D 1/ F
Proposed Guides for the Household Furniture Industry. ^{3/}				
Guides for Advertising Allowances and Other Merchandising Payments and Services.*	118 - 372-73	5/20/69	5/29/69	6/1/69 F F D F F

* Supersedes the Guides for Advertising Allowances and other Merchandising Payments & Services Adopted on May 15, 1960.

1/ Dissent does not appear to be connected with Robinson-Patman Act Provisions.

2/ Not yet promulgated.

3/ Not yet promulgated.

Key

F (In favor)

D (Dissent)

C (Concur)

AB (Absent)

NP (Not Participate)

I. VOTE ON ISSUANCE OF COMPLAINT, INTERLOCUTORY RULINGS INVOLVING ROBINSON-PATMAN ISSUES, AND FINAL ORDERS FOR THOSE COMPLAINTS ISSUED SUBSEQUENT TO JANUARY 1, 1961.*

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES		VOTE ON FINAL ORDER
			(d)	Unanimous (Mr. Mills not participating; hereafter: NP)	(d)	Unanimous (5/25/61)	
8293	Markal Paper Mills, Inc. (3/2/61)	(d)	Unanimous (Mr. Mills NP)	Unanimous (10/31/61)	Unanimous (10/31/61)	Unanimous (5/25/61)	
8294	Robillo & Cuneo (3/2/61)	(d)	Unanimous (Mr. Mills NP)	Unanimous (Mr. Mills NP)	Unanimous (12/18/61)	Unanimous (12/18/61)	
8295	Royal Crown Cola Company (3/2/61)	(d)	Unanimous (Mr. Mills NP)	Unanimous (6/13/61)	Unanimous (6/13/61)	Unanimous (6/13/61)	
8312	C. F. Sauer Company (3/13/61)	(d)	Messrs. Kern, Anderson & Kintner for Mr. Secret absent; hereafter: abs.)	Messrs. Dixon, Kern & Elman for (Messrs. Secret & Anderson abs.) (8/3/61)	Messrs. Dixon, Kern & Elman for (Messrs. Secret & Anderson abs.) (8/3/61)	Messrs. Dixon, Kern & Elman for (Messrs. Secret & Anderson abs.) (8/3/61)	
8313	Usen Canning Company (3/13/61)	(d)	Messrs. Kintner, Kern & Anderson for (Mr. Secret abs.)	Unanimous (Mr. Dixon abs.)	Unanimous (9/26/61)	Unanimous (9/26/61)	
8317	Kimbriel & Co. Inc. (3/14/61)	(c)	Messrs. Kintner, Anderson & Kern for (Mr. Secret abs.)	Order to vacate Initial Decision and Demand to Hearing Examiner for further proceedings, Unanimous (Mr. Dixon abs.) (6/6/61)	Order to vacate Initial Decision and Demand to Hearing Examiner for further proceedings, Unanimous (Mr. Dixon abs.) (6/6/61)	Order to vacate Initial Decision and Demand to Hearing Examiner for further proceedings, Unanimous (Mr. Dixon abs.) (6/6/61)	
8328	Pittsburgh Plate Glass Co. (3/16/61)	(c)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (6/13/61)	Unanimous (6/13/61)	
8342	Golden Press, Inc. (4/5/61)	(d)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (6/13/61)	Unanimous (6/13/61)	
8343	Grosset & Dunlap, Inc. (4/5/61)	(d)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (6/13/61)	Unanimous (6/13/61)	
8344	Holt, Rinehart & Winston, Inc. (4/5/61)	(d)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	
8357	Haffield Fruit Co. (4/14/61)	(c)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.)	

* / Dates given under Heading entitled "CASE NAME" are dates of actual issuance of complaints; dates given under Headings entitled "VOTE ON INTERLOCUTORY RULINGS"
and "VOTE ON FINAL ORDER" are dates of voting, except on C-Docket Numbers when the date of actual issuance and order is given.

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
8359	Pride O'Texas Citrus Ass'n (4/17/61)	(c)	Unanimous	Unanimous (Mr. Kern abs.)	Messrs. Dixon, Anderson Elman & MacIntyre for (Mr. Kern abs.) (12/7/61)
8360	Eastern Marketing Service (4/17/61)	(c)	Unanimous	Unanimous (Mr. Kern & Elman for Messrs. Secret & Anderson abs.) (9/12/61)	Messrs. Dixon, Kern & Elman for Messrs. Secret & Anderson abs.) (9/12/61)
8364	Sergeant & Nicholson (4/17/61)	(c)	Unanimous	Unanimous (Mr. Anderson abs.)	Unanimous (Mr. Anderson abs.) (9/5/61)
8371	T.W. Holt & Company (4/21/61)	(d)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.) (9/26/61)	Unanimous (Mr. Anderson abs.) (9/26/61)
8377	Comptone Company (4/25/61)	(d)	Unanimous (Mr. Kern abs.)	Unanimous (Mr. Kern abs.) (10/3/61)	Unanimous (Mr. Kern abs.) (10/3/61)
8391	Central Arkansas Milk Producers Ass'n (5/5/61)	(a)	Messrs. Dixon, Anderson & Elman for (Messrs. Secret & Kern abs.)	(a) Request by CSC for Inter- locutory Appeal from denial of Motion to Amend Complaint denied by Mr. Elman (Motions Commissioner) (1/19/62); confirmed by Commission 1/23/62; (b) Motion to defer ruling on Motion to quash Subpoena, Messrs. Anderson & Elman for, Messrs. Dixon, Kern & MacIntyre against: Subsequent Motion to grant Respondent's Request to File Interlocutory appeal, Messrs. Dixon, Anderson, Kern & MacIntyre for, Mr. Elman abstaining.	Unanimous (Mr. Reiley NF) (2/5/64) (2/5/64) Unanimous (Mr. Reiley NF) (2/5/64) Unanimous (Mr. Elman abstaining). (b) Motion to defer ruling on Motion to quash Subpoena, Messrs. Anderson & Elman for, Messrs. Dixon, Kern & MacIntyre against: Subsequent Motion to grant Respondent's Request to File Interlocutory appeal, Messrs. Dixon, Anderson, Kern & MacIntyre for, Mr. Elman abstaining.
8406	United Farmers of New England, Inc. (5/26/61)	(a & d)	Unanimous	Unanimous (Mr. Kern abs.) (3/21/62)	Unanimous (Mr. Kern abs.) (3/21/62)
8408	Star Fruit Company (6/1/61)	(c)	Unanimous	Unanimous (Mr. Kern abs.)	Messrs. Dixon, Anderson Elman & MacIntyre for (Mr. Kern dissented for the Minute Record only)
8617	American Stratigraphic Company (6/1/61)	(a)	Unanimous	Unanimous (2/15/62)	Unanimous (2/15/62)
8421	The Regina Corporation (6/2/61)	(d)	Unanimous	Unanimous (2/1/62)	Unanimous (2/1/62)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
C-54	Lamin Sales Company (12/27/61)	(c)	Unanimous		Unanimous (Mr. Anderson abs.) (12/27/61)	Unanimous (12/27/61)
C-64	Geo. C. Palmer Brokerage Co., Inc. (1/17/62)	(c)	Unanimous (Mr. Kern abs.)		Unanimous (Mr. Anderson abs.) (1/17/62)	Unanimous (Mr. Anderson abs.) (1/17/62)
C-66	Eustis Fruit Company, Inc. (1/24/62)	(c)	Unanimous		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (1/24/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (1/24/62)
C-67	Alamo Fruit & Vegetable Co., Inc. (1/24/62)	(c)	Unanimous (Mr. Kern abs.)		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (1/24/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (1/24/62)
C-69	Mission Citrus Growers, Inc. (2/2/62)	(c)	Unanimous (Mr. Kern abs.)		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (2/12/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented. (2/12/62)
C-75	Lake Charm Fruit Company	(c)	Unanimous (Mr. Kern abs.)		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (2/12/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (2/12/62)
C-76	Lake Region Packing Ass'n (2/12/62)	(c)	Unanimous		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (2/12/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (2/12/62)
8475	Dixie-Central Produce Co. Inc. (4/2/62)	(c)	Unanimous		Unanimous (Mr. Kern NP) (7/9/62)	Unanimous (Mr. Kern NP) (7/9/62)
C-109	Sofskin, Inc. (4/2/62)	(d)	Unanimous		Unanimous (4/2/62)	Unanimous (4/2/62)
C-116	O. P. Hesser, Broker (4/16/62)	(c)	Unanimous		Unanimous (4/16/62)	Unanimous (4/16/62)
C-127	O.E.M. Products Company (4/26/62)	(c)	Unanimous		Unanimous (4/26/62)	Unanimous (4/26/62)
8485	All-Luminum Products Inc. (5/8/62)	(d)	Unanimous		Meers, Dixon, Anderson, Elman and Harganboram for, Mr. MacIntyre against (on narrow- ness of order) (11/1/63)	Meers, Dixon, Anderson, Elman and Harganboram for, Mr. MacIntyre against (on narrow- ness of order) (11/1/63)
C-131	Edinburg Citrus Association (5/8/62)	(c)	Unanimous		Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (5/8/62)	Meers, Dixon, Anderson, Elman and MacIntyre for, Mr. Kern dissented (5/8/62)
C-136	California Fruit Exchange (5/16/62)	(c)	Unanimous		Unanimous (5/16/62)	Unanimous (5/16/62)
C-138	Brown & Loe, Inc. (5/16/62)	(c)	Unanimous		Unanimous (5/16/62)	Unanimous (5/16/62)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
8487	General Electric Company (5/28/62)	(d)	Unanimous		Messrs. Dixon, Anderson, Elman and Reilly for (dismissal of complaint), Mr. MacIntyre not concurring.
C-146	Weaco Products Company Inc. (5/29/62)	(a)	Unanimous		Unanimous (Mr. Kern abs.) (5/29/62)
8491	Cheesbrough-Pond's, Inc. (6/13/62)	(a)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8492	Union Carbide Corporation (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8493	Becton, Dickinson & Co. (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8494	Warner-Lambert Pharmaceutical Co. (6/19/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8495	Julius Schmid, Inc. (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8496	The Mennen Company (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	
			VOTE ON FINAL ORDER	VOTE ON FINAL ORDER	Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)
8437	Eversharp, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8498	Sterling Drug, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8499	Corn Products Company (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8500	White Laboratories, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8501	Sylvania Electric Products, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8502	Chemway Corporation (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	
8503	The D-Con Company, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and McIntyre for declaratory orders, Mr. Reilly dissenting in part, of the opinion certain issues should have been adjudicated. (7/21/64)	

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS		VOTE ON FINAL ORDER
			INVOLVING R-P ISSUES		INVOLVING R-P ISSUES		
8504	Hazel Bishop, Inc. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Respondent's Request to File Inter- locutory Appeal from Denial of Motion to Dismiss Denied, Unanimous.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)
8505	Philip Morris Incorporated (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.		Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)
8506	Lehn & Fink Products Corp. (6/13/62)	(d)	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Revised Order to Remand Stipulation and Consent Order Certified by Hearing Examiner, Unanimous.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon, Anderson, Elman and MacIntyre for declaratory orders, Mr. Reilly dissenting, in part, of the opinion cer- tain issues should have been adjudicated. (7/21/64)
8507	B. T. Babbitt, Inc. (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Order closing case, Messrs. Elman, MacIntyre, Reilly and Miss Jones for Mr. Dixon against. (6/24/65)
8508	Youngs Rubber Corporation (6/13/62)	(d)		Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Elman no, Messrs. Anderson and Kern abs.	Order closing case, Messrs., Elman, MacIntyre, Reilly and Miss Jones for Mr. Dixon against. (6/24/65)
8510	McKesson & Robbins, Inc. (6/13/62)	Sec. 5			Messrs. Dixon and Anderson for, Mr. Dixon no, Messrs. Anderson and Kern abs.	Messrs. Dixon and Anderson for, Mr. Dixon no, Messrs. Anderson and Kern abs.	Unanimous (6/19/62)
8511	Druggist's Service Council, Inc. (6/13/62)	Sec. 5					
C-150	H.S.D. Publications, Inc. (6/19/62)	(d)					

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
			Unanimous	Unanimous (6/22/62)	Unanimous (6/22/62)
C-151	National Police Gazette (6/22/62)	(d)	Unanimous	Unanimous	Unanimous (6/22/62)
8513	Atlantic Products Corporation (6/25/62)	(d)	Unanimous	Unanimous	Unanimous, Mr. Anderson NP (1/2/13/63)
8514	Tung-Sol Electric, Inc. (6/27/62)	(a)	Unanimous	Unanimous	Hearrs, Anderson, Elman and Higginbotham for (narrow order), Messrs. Dixon and MacIntyre not concurring. (9/12/63)
C-155	Williams Press, Inc. (6/28/62)	(d)	Unanimous	Unanimous	Unanimous (6/28/63)
8516	RHM Publishing Company (6/29/62)	(d)	Unanimous	Unanimous	Unanimous (3/28/63)
C-157	Johnson Publishing Company (7/10/62)	(d)	Unanimous	Unanimous	Unanimous (7/10/62)
C-158	Gernsback Publications, (7/10/62)	(d)	Unanimous	Unanimous	Unanimous (7/10/62)
C-159	Mercury Press, Inc. (7/10/62)	(d)	Unanimous	Unanimous	Unanimous (7/10/62)
C-160	Feature Publications, (7/10/62)	(d)	Unanimous	Unanimous	Unanimous (7/10/62)
C-161	Ballantine Books, Inc. (7/11/62)	(d)	Unanimous	Unanimous	Unanimous (7/11/62)
C-162	Ideal Publishing Corpora- tion (7/11/62)	(d)	Unanimous	Unanimous	Unanimous (7/11/62)
C-163	Flying Eagle Publications, Inc. (7/11/62)	(d)	Unanimous	Unanimous	Unanimous (7/11/62)
C-164	Paperback Library, Inc. (7/13/62)	(d)	Unanimous	Unanimous	Unanimous (7/13/62)
C-165	The Ring, Inc. (7/13/62)	(d)	Unanimous	Unanimous	Unanimous (7/13/62)
C-166	Berkley Publications Corporation (7/13/62)	(d)	Unanimous	Unanimous	Unanimous (7/13/62)

<u>DOCKET NO.</u>	<u>CASE NAME</u>	<u>SECTION</u>	<u>VOTE ON COMPLAINT</u>	<u>VOTE ON INTERLOCUTORY RULINGS</u>	<u>VOTE ON FINAL ORDER</u>
			<u>INVOLVING R-P ISSUES</u>		
C-173	Belmont Productions, Inc. (7/17/62)	(d)	Unanimous		Unanimous (7/17/62)
C-174	Sterling Group, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-175	Kable News Company (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-176	Archie Comic Publications Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-177	By-Line Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-178	Stanley Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-179	Peterson Publishing Company (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-180	E. C. Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-181	Publications Management Corporation (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-182	Harvey Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-183	Popular Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-184	Publishers Distributing Corporation (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-187	Pyramid Publications, Inc. (7/18/62)	(d)	Unanimous		Unanimous (7/18/62)
C-189	Tom Lange Company, Inc. (7/23/62)	(d)	Unanimous		Unanimous (7/23/62)
C-200	Male Publishing Corp. (7/26/62)	(d)	Unanimous		Unanimous (7/26/62)
C-201	Royal Publications, Inc. (8/3/62)	(d)	Unanimous		Unanimous (8/3/62)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
C-202	Variety, Inc. (8/3/62)	(d)	Unanimous		Unanimous (8/3/62)
C-203	Golf Digest, Inc. (8/7/62)	(d)	Unanimous		Unanimous (8/7/62)
C-205	Walter Holding Company (8/15/62)	(c)	Unanimous		Unanimous (8/15/62)
C-207	Mission Fruit & Vegetable Company (8/21/62)	(c)	Unanimous		Unanimous (8/21/62)
C-208	Mystery Publishing Company (8/24/62)	(d)	Unanimous		Unanimous (8/24/62)
C-212	Republic Holding Corporation (9/5/62)	(d) (e)	Unanimous		Unanimous (9/5/62)
C-213	Actual Publishing Corporation (9/10/62)	(d)	Unanimous		Unanimous (9/10/62)
C-226	Disposable, Inc. (9/11/62)	(d) (e)	Unanimous		Unanimous (9/11/62)
C-228	Alamo Fruit Distributors, Ltd. (9/11/62)	(c)	Unanimous		Unanimous (9/11/62)
C-232	Chas. A. Rogers & Sons. (9/12/62)	(c)	Unanimous		Unanimous (9/12/62)
C-233	Larry Lightner (9/13/62)	(c)	Unanimous		Unanimous (9/13/62)
C-248	Spada Fruit Sales Agency, Inc. (10/3/62)	(c)	Unanimous		Unanimous (10/3/62)
C-251	Warren Fruit Company, Inc. (10/17/62)	(c)	Unanimous		Unanimous (10/17/62)
8537	Shell Oil Company (10/16/62)	(a)	Messrs. Dixon, Kern and MacIntyre for Messrs. Anderson and Elman dissented.	(a) Respondent's appeal from hearing Examiner's denial of Motion to strike testimony Denied, Messrs. Dixon, Anderson, Kern and MacIntyre for, Mr. Elman NP (12/13/62);	Complaint dismissed, Messrs. Elman and Reilly and Miss Jones for, Mr. MacIntyre dissented, Mr. Dixon NP (12/23/64).
				(b) Respondent's appeal from hearing Examiner's denial of Motion to strike testimony Denied, Messrs. Dixon, Anderson, MacIntyre and Higginbotham for, Mr. Elman NP (1/21/63);	

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
				(c) Respondent's Motion for production of documents by Complaint Counsel Denied, Messrs. Dixon, Anderson and MacIntyre for, Mr. Elman NP (Mr. Higginbotham abs., recorded in favor of order but not accompanying opinion) (1/29/63);	
				(d) Respondent's Motion to place certain documents in the public record Denied, Messrs. Dixon, Anderson, MacIntyre, and Higginbotham for, Mr. Elman NP (3/5/63);	
				(e) Respondent's Motion to Dismiss Denied, Messrs. Dixon and MacIntyre for, Messrs. Anderson and Higginbotham concurring in result. Mr. Elman NP (9/4/63);	
				(f) Respondent's Motion to Disqualify the Commission from passing on the Initial Decision Denied. Messrs. Dixon, Anderson, MacIntyre and Higginbotham for, Mr. Elman NP (11/13/63).	
8543	Monroe Auto Equipment Company (11/5/62)	(a)	Unanimous	Messrs. Reilly and MacIntyre for, Mr. Dixon concurred. Mr. Elman dissented (7/28/64).	
8544	Humble Oil & Refining Company (11/5/62)	(a)	Messrs. Dixon, Anderson and MacIntyre for, Mr. Elman dissented (Mr. Kern NP).	Appeal of Complaint Counsel from Denial of request for documentary materials underlying Respondent's cost Defense Denied, Unanimous 12/4/63).	Order Dismissing Complaint. Messrs. Dixon, Elman, Reilly and Miss Jones for, Mr. MacIntyre not concurring (5/26/65).
C-267	The Capital Distributing Company (11/15/62)	(d)	Unanimous		Unanimous (11/15/62)
C-272	Wayne L. Bowman Co., Inc. (11/29/62)	(c)	Unanimous		Unanimous (11/29/62)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES		VOTE ON FINAL ORDER	
			VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER	VOTE ON FINAL ORDER	VOTE ON FINAL ORDER	VOTE ON FINAL ORDER
8548	National Dairy Products Corporation (12/7/62)	(a)	Meiss, Dixon, and MacIntyre for, Mr. Anderson reserving vote, Mr. Elman dissented, Mr. Higginbotham abstained.	(a) Motion of CSC to amend complaint granted, Meiss, Dixon, Anderson, MacIntyre and Higginbotham for, Mr. Elman not concurring (7/23/63)	Meiss, Dixon, MacIntyre and Reilly for the opinion and Final Order, Mr. Elman dissented, Mr. MacIntyre dissented from the dismissal of Count II and III, Miss Jones dissented from the Order. (6/22/67)	Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented (12/18/62)	Meiss, Dixon, MacIntyre, Reilly and Miss Jones for, Mr. Elman dissented (7/27/66)	Meiss, Dixon, MacIntyre, Reilly and Miss Jones for, Mr. Elman dissented (12/18/62)
C-279	Valley Fruit and Vegetable Co. (12/18/62)	(c)	Unanimous	(a) Respondent's Appeal from Denial of Motion to amend answer and answer to request for admissions Granted, Meiss, Dixon, Anderson and Elman for, Mr. Higginbotham abs., Mr. MacIntyre not concurring (9/19/63).	(b) Respondent's Appeal from Denial of Motion to exclude certain documents denied, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented (5/7/64).	Unanimous (1/11/63)	Unanimous (2/7/63)	Unanimous (1/11/63)
8549	Knoll Associates, Inc. (12/17/62)	(a)	Unanimous	(a) Respondent's Appeal from Denial of Motion to exclude certain documents denied, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented (5/7/64).	(b) Respondent's Appeal from Denial of Motion to exclude certain documents denied, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented (5/7/64).	Unanimous (1/11/63)	Unanimous (2/7/63)	Unanimous (1/11/63)
C-299	D. L. Products, Inc. (1/11/63)	(a) (c)	Unanimous	(d)	Unanimous	Unanimous (2/7/63)	Unanimous (2/7/63)	Unanimous (2/7/63)
C-312	Ziff-Davis Publishing Co. (2/7/63)	(d)	Unanimous	(d)	Unanimous (Meiss, Dixon and Higginbotham abs.)	Opinion and Final Order, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented from the Order (Miss Jones NP) (6/16/65)	Opinion and Final Order, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented from the Order (Miss Jones NP) (6/16/65)	Opinion and Final Order, Meiss, Dixon, MacIntyre and Reilly for, Mr. Elman dissented from the Order (Miss Jones NP) (6/16/65)
8557	Ace Books Inc. (3/5/63)	(d)	Unanimous	(d)	Unanimous (Meiss, Dixon and Higginbotham abs.)	Consent Agreements accepted, effective date of Orders postponed, Meiss, Dixon, Anderson and MacIntyre for, Meiss, Elman and Higginbotham dissented (5/1/63)	Consent Agreements accepted, effective date of Orders postponed, Meiss, Dixon, Anderson and MacIntyre for, Meiss, Elman and Higginbotham dissented (5/1/63)	Consent Agreements accepted, effective date of Orders postponed, Meiss, Dixon, Anderson and MacIntyre for, Meiss, Elman and Higginbotham dissented (5/1/63)
C-328-C-490	Abby Kent Co., Inc., et al. and 162 other wearing apparel manufacturers.	(d)	(5/1/65)					

DOCKET NO.	CASE NAME	SECTION	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES		VOTE ON FINAL ORDER
			VOTE ON COMPLAINT	VOTE ON R-P ISSUES	
8564	Garrett-Holmes & Co., Inc. (3/26/63)	(c)	Unanimous		Order Adopting Initial Decision and Final Order, Messrs. Dixon, Elman, Reilley & Miss Jones for, Mr. MacIntyre concurring in the result (2/23/65) Unanimous (4/22/63)
C-493	Dan A. LaPanta Company (4/22/63)	(c)	Unanimous		Unanimous (5/7/63)
C-497	Dieteric Food Co., Inc. (5/7/63)	(a)	Unanimous		Unanimous (6/12/63)
C-505	OZ Publishing Corporation (6/12/63)	(a)	Unanimous		Unanimous (6/20/63)
C-508	R. Guercio & Son, Inc. (6/20/63)	(c)	Unanimous		Order Closing Case Unanimous (10/13/65)
8581	Furr's, Inc. (6/28/63)	Sec. 5	Unanimous (Mr. Anderson abs.)		Order of Demand on Respondent's Motion for Production of Document, Unanimous (Mr. Anderson abs., Mr. MacIntyre NF) (11/14/63)
8584	Surprise Brassiere Co. Inc.	(d)	Unanimous		Respondent's Petition for Trade Practice Rule and Abatement of this proceeding Denied, Unanimous (9/7/65)
C-540-C-566	Baracute, Inc. and 26 other wearing apparel manufacturers	(d)	8/12/63 See Docket C-925-C-979 below		③ (12/6) See Docket C-925-C-979 below
8599	William M. Rorer, Inc. (9/30/63)	(a)	Unanimous (Messrs. Anderson & Elman NF)		Messrs. Dixon, Reilley & Miss Jones for, Messrs. Elman & MacIntyre concurring (4/13/66) Unanimous (11/5/64)
C-616	The Kiwi Polish Company Proprietary Ltd. (4/5/63)	(a)	Unanimous		Unanimous (11/5/63)
C-639-C-671	Adle Fashions, Inc. etc. and 32 Other wearing apparel manufacturers	(d)	(1/3/64) See Docket C-925-C-979 below		1/3/64 See Docket C-925-C-979 below

DOCKET NO.	CASE NAME	SECTION	VOTE ON INTERLOCUTORY RULINGS		VOTE ON FINAL ORDER
			VOTE ON COMPLAINT	VOTE ON R-P ISSUES	
C-705	Bali Brassiere Company, Inc. (2/7/64)	(d)	Unanimous		Unanimous (2/7/64)
C-717	L'Aiglon Apparel, Inc.	(d)	2/27/64 See Docket C-925- G-979 below		2/27/64 See Docket C-925- C-979 below
8620	The Lovable Company (4/20/64)	(d)	Unanimous		Unanimous, Mr. Elman concurred in the result (6/23/64)
C-765	Proclino-Rossi Corporation (6/30/64)	(a, d, e)	Unanimous		Unanimous (6/30/64)
C-766	Ideal Macaroni Company (6/30/64)	(d)	Unanimous		Unanimous (6/30/64)
C-767	Gloia Macaroni Company, Inc. (6/30/64)	(d)	Unanimous		Unanimous (6/30/64)
C-768	Prince Macaroni Manuf. Company (6/30/64)	(a, d, e)	Unanimous		Unanimous (6/30/64)
C-769- C-775	The Alligator Company and 6 other wearing apparel manufacturers	(d)	6/30/64, See Dockets C-925- C-979 below		6/30/64, See Dockets C-925- C-979 below
8625	Branford Co., Inc. (6/30/64)	(d)	Unanimous		See Dockets C-925-C-979 below
8626	Brownie Knitting Mills, Inc. (6/30/64)	(d)	Unanimous		See Docket C-925-O-979 below
8629	Rabiner & Jontow, Inc. (6/30/64)	(d)	Unanimous		Messrs. Dixon, MacIntyre, Reilly & Miss Jones for, Mr. Elman dissented (9/15/66)
8630	Nancy Greer, Inc. (6/30/64)	(d)	Unanimous		See Dockets C-925-C-979 below
8631	House of Lords, Inc. (6/30/64)	(d)	Unanimous		Opinion & Final Order, Messrs. Dixon, & MacIntyre for, Mr. Reilly & Miss Jones made separate concurrences, Mr. Elman dissented (1/3/66)

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES		VOTE ON FINAL ORDER See Dockets C-925-C-979 <u>below</u>
			VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER See Dockets C-925-C-979 <u>below</u>	VOTE ON FINAL ORDER See Dockets C-925-C-979 <u>below</u>	
8632	Barclay Knitwear Co., Inc. (6/30/64)	(d)	Unanimous				
8633	Boepple Sportswear Mills Inc. (6/30/64)	(d)	Unanimous				
C-794	Fashion Park, Inc.	(d)	7/17/64 See Docket C-925-C-979 <u>below</u>		7/17/64 See Docket C-925-C-979 <u>below</u>		
C-803	National Togs, Inc.	(d)	8/3/64 See Docket C-925-C-979 <u>below</u>		8/3/64 See Docket C-925-C-979 <u>below</u>		
8647	Clairrol Incorporated (9/15/64)	(d)	Messrs. Dixon & MacIntyre for, Mr. Elman dissented (Mr. Reilley & Miss Jones NP) (9/19/64)		Messrs. Dixon, MacIntyre, Reilley & Miss Jones for, Mr. Elman dissented (6/15/66)		
C-832	Clairrol Incorporated (9/15/64)	(a)	Unanimous		Unanimous (9/15/64)		
C-834-C-836	Corton City Work Frocks, Inc. and two other wearing apparel manufacturers		9/18/64 See Docket C-925-C-979 <u>below</u>		9/18/64 See Docket C-925-C-979 <u>below</u>		
C-837	General Railway Signal Company (9/24/64)	(a)	Unanimous		Unanimous (9/24/64)		
C-841	Chestnut Hill Industries, Inc.	(d)	9/29/64 See Docket C-925-C-979 <u>below</u>		9/29/64 See Docket C-925-C-979 <u>below</u>		
C-882	The Kramer Company	(d)	2/23/65 See Docket C-925-C-979 <u>below</u>		2/23/65 See Docket C-925-C-979 <u>below</u>		
C-885	Federal Sweets & Biscuit Company, Inc. (3/3/65)	(a)	Unanimous		Unanimous (3/3/65)		
C-919	American Rolex Watch Corporation (7/21/65)	(d)	Unanimous		Unanimous (7/21/65)		
C-920	Norman M. Morris Corporation (7/26/65)	(d)	Unanimous		Unanimous (7/26/65)		

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
8663	Batrice Foods Co., 6 The Kroger Co., Inc. (7/30/65)	(a & f)	Messrs. Dixon, MacIntyre & Miss Jones for, Mr. Elman dissented, Mr. Reilly dissented in part		Beatrice Appeal from Initial Decision, Denied, Kroger allowed to appeal Order Taking official Notice of certain facts, Messrs. Dixon, MacIntyre & Reilly & Miss Jones for, Mr. Elman dissented (11/30/65) Previous ruling Reconsidered and Rejected, same vote (1/18/66)	
8664	Gladstone-Arcun4, Inc. (7/30/65)	(d)	Messrs. Dixon, MacIntyre, Reilly & Miss Jones for, Mr. Elman dissented.			
C-925- C-979	Aansworth, Ltd. & 54 other wearing apparel manufacturers	(d)	(8/12/65) See Order		Consent agreements accepted These and previously issued--but postponed-- Orders made effective, including Dockets C-328 thru C-490, C-540 thru C-566, C-639 thru C-671, C-717, C-769 thru C-775, 8625, 8626, 8630, 8632, 8633, C-794, C-803, C-834 thru C-836, C-841, and C-852, 8/15/65, Messrs. Dixon, MacIntyre and Reilly and Miss Jones for, Mr. Elman dissented (8/12/65)	
8666	Clariles Sportwear Co., Inc. and two other wearing apparel manufacturers	(d)	9/20/65 See Order			
8666	Viviano Macaroni Company (9/21/65)	(a, d, e)	Unanimous			
8669	Rest & Company (11/1/65)	Sec. 5		Messrs. Dixon, MacIntyre, Reilly and Miss Jones for, Mr. Elman dissented (10/27/65)	Unanimous (7/20/67)	
				Messrs. Dixon, MacIntyre and Miss Jones for, Mr. Elman dissented (Mr. Nicholson NP) (2/14/68)		

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT		VOTE ON INTERLOCUTORY RULINGS		VOTE ON FINAL ORDER
			INVOLVING R-P ISSUES				
C-1020	Dan Millstein, Inc. (11/23/65)	(d)	See Order		Mrs. Dixon, MacIntyre, Reiley and Miss Jones for, Mr. Elman dissented (11/23/65)		
8672	Suburban Propane Gas Corporation (11/26/65)	(f)	Unanimous (Miss Jones NP)	(a) Respondent's Motion to Dismiss for Lack of Public Interest and to Join Phillips Petroleum Corp., Denied; Ruling on Burden of Proof Remanded to Hearing Examiner, Unanimous (5/23/67); (b) Hearing Examiner's Dismissal For Want of Prosecution Reversed, Trial Brief of CSC Held to Meet Burden of Proof on Coat Justification Issue, Mears, Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman dissented (5/29/68)			
				(c) Respondent's Motion to withdraw proceeding from adjudication and for Settlement on Voluntary Assurances Denied, Mears, Dixon, MacIntyre, Nicholson and Miss Jones for, Mr. Elman dissented (9/24/68); (d) Respondent's Appeal to Dismiss on the Merits Denied, Mears, Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman dissented (6/17/69); (e) Respondent's Motion to Dismiss on the Grounds of Want of Public Interest Denied, Mears, Dixon, Nicholson & Miss Jones for, Mr. Elman dissented, Mr. MacIntyre abstained (8/22/69).			
C-1023	Robert Carp, Inc. (12/16/65)	Sec. 5	Unanimous		Unanimous (12/16/65)		
C-1052	Cott Corporation (3/23/66)	(d)	Unanimous		Unanimous (3/23/66)		
C-1062	Norcal Distributors, Inc. (4/29/66)	(f)	Unanimous		Unanimous (4/29/66)		

DOCKET NO.	CASE NAME	SECTION	VOTE ON COMPLAINT	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES	VOTE ON FINAL ORDER
C-1066	Universal Publishing & Distributing Corp. (5/13/66)	(d)	Unanimous		Unanimous (5/13/66)
C-1068	Peck & Peck (5/19/66)	Sec. 5	Unanimous		Unanimous (5/19/66)
C-1070	Evergreen Warehouse Distributors, Inc. (6/1/66)	(f)	Unanimous		Unanimous (6/1/66)
C-1090	Beatrice Foods Company (8/2/66)	(d)	Unanimous		Unanimous (8/2/66)
C-1097	Times Sq. Stores Corp. (8/15/66)	Sec. 5	Unanimous		Unanimous (8/15/66)
C-1177	Pacific Gamble Robinson Co. (2/28/67)	Sec. 5	Unanimous		Unanimous (2/28/67)
C-1178	Peter Pan Foundations, Inc. (3/1/67)	(d & e)	Unanimous		Unanimous (3/1/67)
C-1185	Susan Thomas, Inc., (3/20/67)	(d)	Unanimous		Unanimous 3/20/67)
C-1201	A. Greenhouse, Inc., (4/27/67)	(c)	See Order		
8736	Connell Rice & Sugar Company, Inc. (5/8/67)	(a, c, f and Sec. 5)	Measrs. Dixon, MacIntyre, Elman & Miss Jones for, Mr. Reilley dissented only as to Sec. 5 Count		Consent Agreement Accepted, Measrs. Dixon, MacIntyre, Reilley & Miss Jones for, Mr. Elman dissenting (2/12/69)
C-1248	Herman Miller, Inc. (6/30/67)	(a)	Unanimous		Unanimous (6/30/67)
8740	Jens Risom Design, Inc. (7/21/67)	(a)	Measrs. Dixon, MacIntyre & Miss Jones for, Mr. Elman dissented (7/19/67)		Messrs. Dixon, MacIntyre & Miss Jones for, Mr. Elman dissented (12/2/67)

DOCKET NO.	CASE NAME	SECTION	VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES		VOTE ON FINAL ORDER
			VOTE ON COMPLAINT	VOTE ON FINAL ORDER	
8741	Directional Contract Furniture Corp. (9/21/67)	(a)	Messrs. Dixon, MacIntyre, Reilley and Miss Jones for, Mr. Elman dissented	Unanimous (2/21/68)	Unanimous (2/21/68)
C-1253	Rheumark Brokerage Inc. (9/25/67)	(c)	Unanimous	Unanimous (9/25/67)	Unanimous (9/25/67)
C-1254	United Sales, Inc. (9/25/67)	(c)	Unanimous	Unanimous (9/25/67)	Unanimous (9/25/67)
C-1255	Rigley Distributing Company, Inc. (9/25/67)	(c)	Unanimous	Unanimous (9/25/67)	Unanimous (9/25/67)
C-1256	Griff's of America, Inc. (9/23/67)	(c)	Unanimous	Unanimous (9/23/67)	Unanimous (9/23/67)
C-1339	Alliance Associates, Inc. (5/20/68)	(c)	Unanimous	Unanimous (5/20/68)	Unanimous (5/20/68)
C-1381	Morton Manufacturing Company (7/19/68)	(c)	Unanimous	Unanimous (7/19/68)	Unanimous (7/19/68)
C-1382	Armed Industries Incorporated (7/19/68)	(c)	Unanimous	Unanimous (7/19/68)	Unanimous (7/19/68)
C-1384	A. Stucki Company (7/19/68)	(c)	Unanimous	Unanimous (7/19/68)	Unanimous (7/19/68)
C-1385	Crucible Steel Company of America (7/19/68)	(c)	Unanimous	Unanimous (7/19/68)	Unanimous (7/19/68)
C-1410	Stow & Davis Furniture Company (8/23/68)	(a)	Unanimous (Mr. Elman NP)	Unanimous (Mr. Elman NP) (8/23/68)	Unanimous (Mr. Elman NP) (8/23/68)
8768	Colonial Stores Incorporated (9/20/68)	Sec. 5	Unanimous	None (Pending)	None (Pending)
C-1492	The Weatherhead Company (2/20/69)	(a)	Unanimous	Unanimous (2/20/69)	Unanimous (2/20/69)
8777	Korell Corporation (4/10/69)	(d)	Messrs. Dixon, MacIntyre, Nicholson and Miss Jones for, Mr. Elman dissented		

<u>DOCKET NO.</u>	<u>CASE NAME</u>	<u>SECTION</u>	<u>VOTE ON COMPLAINT</u>	<u>VOTE ON INTERLOCUTORY RULINGS INVOLVING R-P ISSUES</u>	<u>VOTE ON FINAL ORDER</u>
			<u>(c)</u>	<u>See Order</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8786	Food Fair Stores, Inc. (7/10/69)	(c)	<u>Messrs. Dixon, MacIntyre and Miss Jones for, Messrs. Elman and Nicholson dissented</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8787	H. C. Bohack Co., Inc. (7/10/69)	(c)	<u>Same as 8786 above</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8788	Jewel Companies, Inc. (7/10/69)	(c)	<u>Same as 8786 above</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8789	Borman Food Stores, Inc. (7/10/69)	(c)	<u>Same as 8786 above</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8790	First National Stores, Inc. (7/10/69)	(c)	<u>Same as 8786 above</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>
8795	United Fruit Company (7/28/69)	(a, f)	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman dissented</u>	<u>None (Pending)</u>	<u>Messrs. Dixon, MacIntyre, Nicholson & Miss Jones for, Mr. Elman not concurring (6/13/69)</u>

II. Vote On Interlocutory Rulings Involving Robinson-Patman Issues and
Final Orders For Those Complaints Issued Prior to January 1, 1961.

(* "NP" - Not Participating)

Docket Number	Case Name	Date of Issuance	Vote on Interlocutory Rulings Involving R-P Issues		Date of Order	Vote on Order
6659	Giant Food, Inc.	11/21/55	-	-	6/1/61	Yes-3; Dixon, Elman NP.
7018	National Dairy Prod. Corp.	12/1/57	-	-	7/28/66	Yes-2; No-Elman; MacIntyre, Jones NP.
7121	National Retailer Owned Grocers, Inc.	4/16/58	-	-	5/14/62	Yes-4; No-Elman.
7129	The Borden Co.	4/22/58	<u>1/30/63 - FTC rejects objection of D to scope of order. Yes-2,</u> Anderson, Higginbotham, MP *	<u>No-Elman,</u> Anderson, Higginbotham NP.	1/30/63	Yes-2; No-Elman; Anderson, Higginbotham NP.
7144	Haines City Citrus Growers Ass'n	5/7/58	Yes-Unanimous	Yes-2; No-Elman; Anderson, Higginbotham NP.	5/19/61	
7207	Forster Mfg. Co., Inc.	7/23/58	<u>3/18/63 - FTC rejects D's objection to scope of order.</u> Yes-2; No-Elman,	Anderson, Higginbotham NP.	3/18/63	Yes-2; No-Elman; Anderson, Higginbotham NP.
7225	Tri-Valley Packing Ass'n	8/6/58	Yes-4, No-Elman.			
7226	Flockill Prods., Inc.	7/24/58	<u>9/8/64 - D's petition to reconsider order is rejected.</u> Yes-3; No-Elman (1 absent)	10/22/63 - FTC dismisses complaint on lack of public interest.	9/28/68	Yes-2; No-Elman; Reilly NP (Only 4 Commissioners.)
7273	Thomasville Chair Co.	10/7/58	Yes-3; No-Elman (1 absent)	10/22/63 - FTC dismisses complaint on lack of public interest.	3/15/61	Yes-Unanimous.
7357	American Motors Corp.	1/6/59	Vote - Unanimous. <u>10/6/65 - FTC denies motion of complainant counsel to clarify order.</u> Vote-Unanimous.	10/6/65 - FTC denies motion of complainant counsel to clarify order. Vote-Unanimous.	7/19/65	Yes-Unanimous.
7379	Bill The Distributor	1/27/59			1/13/61	Yes-Unanimous.
7396	American News Co.	2/5/59			1/10/61	Yes-4; Mills NP.
7420	Bielow Sanford Carpet Co., Inc.	2/17/59			2/15/64	Yes-Unanimous.
7421	Mohasco Industries, Inc.	2/17/59			2/15/64	"
7452	Schulze & Burch Biscuit Company	1/19/59			2/15/64	Yes-4; Reilly NP.
7463	Southwestern Sugar and Molasses Co.	4/1/59			9/12/62	Yes-4; No-MacIntyre.
7474	The Borden Co.	4/17/59			2/7/64	Yes-2; No-Elman; Reilly, MacIntyre NP.
7492	Fred Meyer, Inc.	5/15/59	<u>7/9/63 - FTC rejects D's exception to proposed order. Yes-3;</u> No-Elman, Higginbotham NP.	<u>7/9/63 - FTC rejects D's exception to proposed order. Yes-3;</u> No-Elman, Higginbotham NP.	7/9/63	Yes-3; No-Elman; Higginbotham NP.
7495	Idaho Canning Co.	5/15/59			5/2/61	Yes-Unanimous.
7496	Tri-Valley Packing Ass'n	8/6/58			5/10/62	Yes-4; No-Elman.
7514	Mueller Co.	6/10/59			1/12/62	Yes-Unanimous.
7517	Minute Maid Corp.	6/11/59			3/7/62	"
7590	Automotive Jobbers, Inc.	9/2/59			1/4/62	"
7631	Masey Carpet Co.	10/21/59			2/5/64	"
7632	C. H. Hasland & Sons	10/21/59			2/5/64	"
7633	Beattie Mfg. Co.	10/27/59			2/5/64	"
7634	Callaway Mills Co.	10/27/59			2/5/64	Yes-3; No-Elman; Reilly NP.
7636	A & M Karghehsalar, Inc.	10/21/59			2/5/64	Yes-Unanimous.
7637	Roxbury Carpet Co.	10/21/59			2/5/64	Yes-Unanimous.
7638	Firth Carpet Co.	10/21/59			2/5/64	"
7639	Cabin Crafts, Inc.	10/27/59			2/5/64	Yes-3; No-Elman; Reilly NP.

Docket Number	Case Name	Date of Issuance	Vote on Interlocutory Rulings Involving R-P Issues		Date of Order	Vote on Order
			Ruling	Issue		
7640	James Lee and Sons Co.	10/28/59	-	-	9/8/61	Yes-Unanimous.
7641	Smith Grain Co.	10/29/59	-	-	6/8/61	Yes-Unanimous.
7667	Borg-Warner Corp.	12/1/59	-	-	4/27/61	" " "
7667	Perfect Equip. Corp.	11/22/59	-	-	1/12/61	" " "
7707	Sunshine Biscuits, Inc.	11/22/59	-	-	9/25/61	Yes-4; No-Elman.
7708	Sunshine Biscuits, Inc.	1/5/60	<u>10/10/60 - FTC dismisses complaint - Unanimous.</u>	-	9/28/61	Yes-Unanimous.
7718	Takima Fruit and Cold Storage Co.	1/5/60	<u>12/28/60 - FTC reopens case and demands to examiner.</u>	-	-	-
7719	Shreveport Macaroni Mfg. Co., Inc.	1/5/60	-	-	1/24/62	Yes-Unanimous.
7720	Vanity Fair Paper Mills, Inc.	1/5/60	-	-	3/21/62	Yes-4; No-Elman.
7721	Shulton, Inc.	1/5/60	-	-	7/25/61	Yes-3; No-Kerr, Elman.
7730	Austin Biscuit Corp.	5/23/63 *	<u>5/23/63 - FTC permits complaint counsel to amend complaint to include charge on new pricing system.</u>	<u>Vote-Unanimous.</u>	12/20/63	Yes-Unanimous.
7732	New England Confect. Co.	1/6/60	-	-	11/7/61	Yes-Unanimous.
7739	Robert A. Johnston Co.	1/5/60	-	-	2/7/64	Yes-4; Reilly NP.
7790	Alfonso Gioia & Sons, Inc.	2/17/60	<u>10/6/60 - Order initially approved - Unanimous.</u>	-	6/30/64	Yes-4; MacIntyre abstains.
			<u>2/4/62 - FTC reopens, rescinds order.</u>	<u>Unanimous.</u>		
7813	Joseph A. Kaplan & Sons, Inc.	3/10/60	-	-	11/15/63	Yes-Unanimous.
7815	Chenway Corp.	3/10/60	-	-	12/15/61	" "
7817	United Biscuit Co. of America	3/1/60	<u>6/26/62 - FTC reverses H.E. dismissal on lack of secondary injury and</u>	<u>remands - Unanimous.</u>	<u>2/7/64</u>	<u>Yes-4; Reilly NP.</u>
7848	The Marc Co.	3/28/60	-	-	8/7/62	Yes-4; No-Elman.
7850	Purulator Prods. Inc.	3/22/60	-	-	4/3/64	Yes-3; No-Elman; Reilly NP.
7861	Perfection Gear Co.	4/8/60	-	-	9/23/61	Yes-Unanimous.
7869	R. H. Macy & Co., Inc.	4/19/60	-	-	5/15/62	" "
7908	Lloyd A. Fry Roofing Co.	5/10/60	-	-	7/23/65	Yes-3; Jones, Dixon NP.
7918	Keen Fruit Corp.	6/3/60	-	-	5/19/61	Yes-Unanimous.
7919	Groveland Fruit Co., Inc.	6/1/60	-	-	5/19/61	Yes-4; No-Elman.
7922	Battaglia Fruit Co., Inc.	6/3/60	-	-	5/19/61	Yes-3; No-Elman; Reilly NP.
7923	Zellwood Fruit Distrib., Inc.	6/3/60	-	-	5/19/61	Yes-Unanimous.
7924	John S. Taylor Co.	6/3/60	-	-	5/19/61	" "
7925	Sorrels Bros. Packing Co., Inc.	6/3/60	-	-	5/19/61	" "
7926	Knowles and Co.	6/3/60	-	-	5/19/61	" "
7927	Lakeland Highland Citrus Growers Ass'n, Inc.	6/3/60	-	-	5/19/61	" "
7928	Lake Wales Citrus Growers Ass'n, Inc.	6/3/60	-	-	5/19/61	" "
7929	Peace River Packing Co.	6/3/60	-	-	5/19/61	" "
7930	Lakeland Packing Co., Inc.	6/3/60	-	-	5/19/61	" "
7931	Marion County Citrus Co.	6/3/60	-	-	5/19/61	" "
7932	Nelson & Co., Inc.	6/3/60	-	-	5/19/61	" "
7933	Patrick Fruit Corp.	6/3/60	-	-	5/19/61	" "
7934	Holly Hill Fruit Prods., Inc.	6/3/60	-	-	5/19/61	" "

*Complaint as amended. Original complaint prior to 1961.

Docket Number	Case Name	Date of Issuance	Vote on Interlocutory Rulings Involving R-P Issues	Date of Order	Vote on Order
7935	O. D. Huff, Jr., Groves, Inc.	6/3/60	-	5/19/61	Yes-Unanimous.
7936	Apopka Fruit Co.	6/3/60	-	5/19/61	" "
7972	Wolverine Supply & Mfg. Co.	6/24/60	-	9/19/62	" "
7974	Beneve Indust., Inc.	6/24/60	-	9/19/62	" "
7975	Blinor Corp.	6/24/60	-	11/27/62	Yes-4; Higginbotham NP.
7976	Parter Bros., Inc.	6/24/60	-	11/19/62	Yes-Unanimous.
7977	Am. Machine & Found. Co.	6/24/60	-	9/19/62	" "
7978	Transabram Co., Inc.	6/24/60	-	9/19/62	" "
7979	Ideal Toy Corp.	6/24/60	-	9/19/62	" "
7994	The Graham Co., Inc.	6/24/60	-	1/12/61	" "
7998	Adams Pkgs. Ass'n, Inc.	6/24/60	-	5/19/61	" "
7999	Alturas Pkg. Co., Inc.	6/24/60	-	5/19/61	" "
8000	Arizona Fruit Co., Inc.	6/27/60	-	5/19/61	" "
8001	Babijna Corte, of Florida	6/27/60	-	5/19/61	" "
8002	The Citrapak Corp.	6/27/60	-	5/19/61	" "
8003	Dearfield Growers Co., Inc.	6/21/60	-	5/19/61	" "
8004	Ben Hill Griffin, Inc.	6/21/60	-	5/19/61	" "
8005	Egan, Fickett & Co., Inc.	6/27/60	-	5/19/61	" "
8006	Smith Enterprises, Inc.	6/27/60	-	5/19/61	" "
8007	South Lake Apopka Citrus Growers Asht.	6/21/60	-	5/19/61	" "
8008	Square Deal Fruit Co.	6/27/60	-	5/19/61	Yes-Unanimous.
8009	Chase & Co., Inc.	6/27/60	-	5/19/61	" "
8010	Herman J. Heidrich	6/21/60	-	5/19/61	" "
8011	Heller Bro. Pkg. Co., Inc.	6/21/60	-	5/19/61	" "
8012	Killarney Fruit Co.	6/27/60	-	5/19/61	" "
8013	Lake Hamilton Coop., Inc.	6/27/60	-	5/19/61	" "
8014	Shively Groves, Inc.	6/21/60	-	5/19/61	" "
8015	G. Lester Ivey	6/21/60	-	5/19/61	" "
8016	Noburn Groves, Inc.	6/27/60	-	5/19/61	" "
8017	Waverly Growers Coop., Inc.	6/27/60	-	5/19/61	" "
8018	Roper Growers Corp.	6/21/60	-	5/19/61	" "
8019	Neivins Fruit Co., Inc.	6/21/60	-	5/19/61	" "
8020	Lake Alford Pkg. Co.	6/27/60	-	5/19/61	" "
8032	Dean Milk Co.	6/28/60	<u>3/13/65 - FTC dismisses complaint</u> <u>Yes-3; No-Dixon, MacIntyre,</u> <u>10/6/65 - Dismissal rescinded,</u> <u>order issued. Yes-3; No-Jones, Elman.</u>	10/22/65	Yes-3; No-Elman, Jones.
8038	Craber Mfg. Co.	7/6/60	<u>6/22/65 - FTC dismisses complaint</u> <u>hearing.</u> <u>Yes-3; No-MacIntyre; Jones-NP.</u>	3/27/67	Yes-Unanimous.
8039	National Parts Warehouse	7/12/60	-	12/16/63	Yes-4; No-Elman.
8052	Inland Rubber Corp.	9/11/61 *	-	2/25/63	Yes-Unanimous.
8053	Westinghouse Elec. Corp.	7/20/60	-	9/12/63	" "
8057	Bissell and Conole Inc.	7/29/60	-	5/16/61	" "
8059	Sorrells Bros. Produce Co.	7/29/60	-	8/4/61	" "
8060	Joseph Rothenberg, Inc.	7/29/60	-	9/20/61	" "
8061	Exchange Distrib. Co.	7/23/60	-	7/9/62	" "

* Amended complaint.

Docket Number	Case Name	Date of Issuance	Vote on Interlocutory Rulings Involving R.P. Issues	Date of Order	Vote on Order
8062	Faber Bros., Inc.	7/29/60	-	3/30/61	Yes-Unanimous.
8063	Bruce A. Groves	8/3/60	-	4/13/61	"
8064	Elliott Produce Co.	8/3/60	-	1/3/62	"
8065	Elliott W. Sasabender	8/3/60	-	1/6/61	"
8066	M. Segaro Co.	8/4/60	-	12/9/61	"
8070	Universal-Rundle Corp.	7/27/60	<u>6/26/62</u> - FTC remands dismissal - Unanimous.	6/27/64	"
8084	Yankee Brokerage Co.	8/19/60	<u>9/8/64</u> - FTC denies D's request to stay order. Yes-4 (1 absent.)	9/29/61	"
8090	Grover Mfg. Services, Inc.	8/24/60	<u>6/11/67</u> - FTC again rejects D's motion to stay order - Unanimous.	5/19/61	"
8094	Chun King Sales, Inc.	8/24/60	-	1/12/61	"
8094	J. C. Folger Co.	8/24/60	-	11/14/62	Yes-4; No-Elman.
8095	Michigan Fruit Cannery, Inc.	8/25/60	-	9/20/61	Yes-Unanimous.
8101	Knickbocker Toy Co., Inc.	6/24/60	-	9/19/62	"
8102	Alexander Miner Sales Corp.	8/25/60	-	12/15/62	"
8103	Remco Indust., Inc.	6/24/60	-	9/19/62	"
8104	A. C. Gilbert Co.	8/24/60	-	12/5/62	"
8116	Simmons Co.	9/16/60	-	3/4/61	"
8118	Pentick & Ford Ltd., Inc.	9/16/60	-	4/12/61	"
8119	Quaker Oats Co	9/16/60	-	4/25/62	Yes-3; No-Elman, Anderson.
8123	Tyler Pipe & Foundry Co.	9/26/60	-	8/11/61	Yes-Unanimous.
8128	J. A. Morgan Produce Co.	9/26/60	-	7/19/61	"
8129	Albin Gruchfield	9/27/60	-	7/20/61	"
8130	R. Kastner & Co., Inc.	9/27/60	-	9/15/61	"
8131	F. G. Ford Brokerage Co.	9/27/60	-	9/20/61	"
8142	Jack M. Rawlings, Jr.	10/13/60	-	6/15/61	"
8165	Walden-Sparkman, Inc.	10/13/60	-	9/29/61	"
8147	DiGeorgia Fruit Corp.	10/17/60	-	5/19/61	"
8148	Peoples Pkg. Co., Inc.	10/17/60	-	5/19/61	"
8149	Indian Lake Fruit Co., Inc.	10/17/60	-	5/19/61	"
8164	Jack M. Berry & Co., Inc.	11/4/60	-	10/2/61	"
8177	S. C. Johnson Son, Inc.	11/17/60	-	3/16/61	"
8183	American Oil Co.	11/23/60	-	6/27/62	Yes-4; No-Elman.
8194	Western Fruit Growers Sales Co.	11/29/60	-	10/18/62	Yes-4; No-Elman.
8204	Bob Crum	12/6/60	-	9/29/61	Yes-Unanimous.
8206	Florida Citrus Distrib., Inc.	12/6/60	-	10/16/61	"
8207	Russell-Ward Co., Inc.	12/7/60	-	5/17/61	"
8208	George W. Reaves	12/7/60	-	10/24/61	"
8209	Pure Gold, Inc.	12/7/60	-	10/10/62	"
8210	Flipping Packing Co., Inc.	12/7/60	-	5/19/61	"
8212	Arrow Food Prodts.	12/7/60	-	6/26/62	"
8215	William Mant's Co.	12/8/60	-	9/22/61	"
8224	Revell, Inc.	6/24/60	-	9/19/62	"

Docket Number	Case Name	Issuance	Vote on Interlocutory Rulings Involving R.P. Issues	Date of Order	Vote on Order
8225	Aurora Plastics Corp.	8/25/60	-	12/5/62	Yes-Unanimous.
8226	Kohner Bros., Inc.	6/24/60	-	9/19/62	"
8227	Mattel, Inc.	6/24/60	-	9/19/62	"
8228	Porter Chemical Co.	6/24/60	-	9/19/62	"
8229	Multiple Prods. Corp.	8/25/60	-	12/5/62	"
8230	Halsam Prods. Co.	12/22/60	-	5/14/62	"
8241	Horseman Dolls, Inc.	8/25/60	-	12/5/62	Yes-Unanimous.
8242	Tonka Toys, Inc.	8/25/60	-	12/5/62	"
8243	Fisher-Price Toys, Inc.	6/24/60	-	9/19/62	"
8244	Radio Steel & Mfg. Co.	8/25/60	-	12/5/62	"
8245	Wen-Mac Corp.	6/24/60	-	9/19/62	"
8254	Hubley Mfg. Co.	6/24/60	-	9/19/62	"
8256	Milton Bradley Co.	6/24/60	-	9/19/62	"
8257	Hamilton Steel Prods., Inc.	8/25/60	-	12/5/62	"
8258	Hassenfeld Bros., Inc.	6/24/60	-	9/19/62	"
8269	Rabiner & Jontow, Inc.	7/1/64	Yes -4, No -1 man.	9/19/66	

III. ROBINSON-PATMAN COMPLAINTS AND FTCA § 5 (INDUCTR) COMPLAINTS DISMISSED, WITHDRAWN, TERMINATED, ETC., FROM 3.1-6¹ TO PRESENT

Docket Number, Case Name and Citation	Date of Order	Disfrinatory Practice (6)	Commodity	Reason for Order of Dismissal	Voting Record
D. 6640 Pure Oil Co. 54 FTC 1892 56 FTC 1638, 1647 57 FTC 1542	12/28/64	2(a)	Gasoline	Administrative discretion. Commission had begun comprehensive study of gasoline industry.	Dixon - Did not participate Elman - Dissented MacIntyre - Dissented Jones - Dissented Reilly
D. 6641 Sun Oil Co. 55 FTC 955 61 Supp. 191 63 Supp. 621, 808	3/25/65	2(a)	Gasoline	Administrative discretion. Commission had begun comprehensive study of gasoline industry.	Dixon - Did not participate Elman - Dissented MacIntyre - Dissented Jones - Dissented Reilly
D. 6898 Texaco, Inc. 55 FTC 2034 60 FTC 1887 62 Supp. 463	12/28/64	2(a)	Gasoline	Administrative discretion. Commission had begun comprehensive study of gasoline industry and felt that was better way to implement law than piecemeal case by case.	Dixon - Unanimous Elman - Unanimous MacIntyre - Unanimous Anderson - Unanimous Reilly
D. 7066 Moore Business Forms, Inc. 58 FTC 1168	6/18/64	2(a)	Business forms	Failure to prove competitive injury.	Dixon - Did not participate Elman - Did not participate MacIntyre - Did not participate Anderson - Did not participate Reilly
D. 7087 Varco, Inc. 58 FTC 1168	2/24/64	2(s)	Business forms	Failure to prove competitive injury.	Dixon - Dissented Elman - Dissented MacIntyre - Dissented Anderson - Dissented Reilly
D. 7094 Admiral Corp. 55 FTC 2078	4/7/65	?(a), 2(d)	TV Apparatus TV Sets Major Appliances	Failure of proof - of competitive injury.	Dixon - Dissented Elman - Dissented MacIntyre - Dissented Reilly
D. 7121 National Retailer-Owned Groceries, Inc. 60 FTC 1208	5/14/62	2(c)	Food products	Insufficient evidence of actual brokerage passing between N.R.O.G. and suppliers, therefore dismissed as to that respondent.	Dixon - Unanimous Elman - Unanimous MacIntyre - Unanimous Korn - Unanimous Anderson

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 7136 International Milling Co., American Motors Corp. Trade Reg. Rep. (1965-1967 Transfer Binder) Par. 17297	11/6/63	2(a), 2(e)	Food Products Flour	Failure of proof re price discrimination	Dixon - Unanimous Elman MacIntyre Higinbotham Anderson
D. 7357 American Metal Products Co., 58 FTC 1165 60 FTC 1667	5/8/68	2(a)	Electrical Major Appliances	Dismissed in compliance with opinion of 6th Cir. Court of Appeals.	Dixon - Unanimous Elman MacIntyre Jones Nicholson
D. 7365 American Metal Products Co., 58 FTC 1165 60 FTC 1667	6/8/62	2(a), 2(f)	Sanitary Ware	Moot - Grantor no longer manufactures product, recipient no longer purchased from any source.	Dixon - Unanimous Elman MacIntyre Kern Anderson
D. 7409 Sunbeam Corp. 56 FTC 1657	1/11/65	2(d)	Electrical Appliances	Promotional scheme was available to all and was reasonable. Therefore 2(d) was not violated.	Dixon - Dissented Elman MacIntyre Jones Reilly - Did not participate
D. 7462 Pacific Molasses Co. Trade Reg. Rep. (1965-1967 Transfer Binder) Par. 17638.	8/2/66	2(a)	Molasses Blackstrap	Stale evidence.	Dixon - Did not participate Elman MacIntyre Jones Reilly
D. 7494 Cannon Mills Co., Cannon Mills Co. Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 16682.	4/24/64	2(a)	Sheets and Towels	Failure of proof on issue of probable competitive injury.	Dixon - Unanimous Elman MacIntyre Reilly Jones
D. 7527 Thompson-Hayward Chemical Co., 61 FTC 323	7/31/62	2(a)	Liquid Laundry Bleach	Liquidation of business concerned.	Dixon - Unanimous Elman MacIntyre Anderson Kern
D. 7559 Sperry Rand Corp. Trade Reg. Rep. (1965-1967 Transfer Binder) Par. 17311.	2/17/64	2(a)	Typewriters Business Machines	Isolated, nonrecurring incident, abnormal conditions in industry.	Dixon - Dissented Elman MacIntyre Anderson Reilly - Did not participate

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (b)	Commodity	Reason for Order of Dismissal	Voting Record
D. 7599 Beatrice Foods Co., Inc.	7/29/65	2(a), 2(d)	Food Products Ice Cream	2(b) - Good faith meeting competition.	Dixon Elman MacIntyre Jones Reilly - Dissented - Did not participate
D. 7604 Dayco Corp. Trade Reg. Rep. (1966 Trade Cases) Par. 71810.	10/27/66	2(a)	Automobiles and Accessories - Display equipment.	Appeals Court reversed FTC on basis of procedural error re 2(a).	Dixon Elman MacIntyre Jones Reilly - Dissented
D. 7629 Huber Baking Co. .59 FTC 357.	9/1/61	2(a)	Bakery products.	Respondent no longer engaged in the baking business.	Dixon Elman Secret Anderson Kern - Unanimous
D. 7630 Continental Baking Co. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 16720.	12/31/63	2(a)	Bakery products.	2(b) - meeting competition in good faith.	Dixon Elman MacIntyre Anderson Reilly - Unanimous
D. 7714 J. Weingarten, Inc.	8/13/63	2(d)	Food Products	FTC dismissed case in accordance with District Court order. District Court refused to grant a stay of dismissal pending appeal. FTC won the procedural point on appeal to the Fifth Circuit.	Dixon Elman MacIntyre Anderson Reilly - Unanimous
D. 7716 Nestle-Lemur Co. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 16995.	7/31/64	2(d)	Toilet Preparations Pharmaceutical Supplies.	Dismissed pending outcome of D. 7717. Consent agreement.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 7717 Max Factor & Co. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 16992.	7/22/64	2(d)	Toilet Preparations	Administrative discretion. Action against large buyers under FTC Act, Section 5 would be more effective method of enforcement	Dixon Elman MacIntyre Jones Reilly - Dissented
D. 7721 Shulton, Inc. .59 FTC 106	7/22/64	2(d)	Toilet Preparations	Administrative discretion. Action against large buyers under FTC Act. Section 5 would be more effective method of enforcement.	Dixon Elman MacIntyre Jones Reilly - Dissented

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 7722 Landlin Plus, Inc. Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 16995.	7/31/64	2 (d)	Toilet Preparations	Administrative discretion. Action against large buyers under FTC Act. Section 5 would be more effective method of enforcement.	Dixon - Unanimous Elman MacIntyre Jones Reilly
D. 7732 New England Confectionery Co. 59 FTC 1076	11/7/61	2 (d)	Candy	Insufficient evidence as to Count 11 (2(d)).	Dixon Elman MacIntyre Anderson Kern - Did not participate
D. 7733 Mason, Au and Magenheimer Conf. Mfg. Co. Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 17144.	12/3/64	2 (a), 2 (d)	Candy	Practices discontinued and new management promised not to engage in any in future.	Dixon Elman MacIntyre Jones Reilly - Did not participate
D. 7743 Frank G. Shattuck Co. Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 16882.	4/22/64	2 (a)	Candy	Failure of proof on issue of probable competitive injury.	Dixon Elman MacIntyre Jones Reilly - Dissented - Did not participate
D. 7753 Plumrose, Inc. 58 FTC 1134	6/19/61	2 (d)	Canned Goods	Lack of jurisdiction - Respondent was covered under Packers and Stockyards Act of 1921. Not within FTC jurisdiction.	Dixon Elman MacIntyre Anderson Kern - Unanimous
D. 7835 American Radiator and Standard Sanitary Corp. 61 FTC 930.	10/5/62	FTCA § 5	Plumbing, Heating and Cooling products.	Failure of proof of the discrimination and of respondent's knowledge thereof. Also, tendency to substantially lessen competition not proven.	Dixon Elman MacIntyre Anderson Kern - Unanimous
D. 7864 Ponce Wholesale Mercantile Co. Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 16814.	2/24/64	2 (a)	Tobacco Products	Good faith meeting competition 2(b).	Dixon Elman MacIntyre Anderson Reilly - Did not participate

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 7866 Benner Tea Co., 59 FTC 119	7/25/61	FTC § 5 -	Grocery Products	Original party to induce completely dissolved through change of ownership by sale before complaint issued.	Dixon Elman Seest Anderson Kern - Unanimous
D. 7881 Southern Bakeries Co.,	1/5/65	2(a)	Bakery Products	Record sealed Jan. 5, 1965.	Dixon Elman MacIntyre Jones Reilly - Did not participate
D. 7906 Logan-Long Co., Trade Reg. Rep. (1965- 1967 Transfer Binder) Par. 17364.	12/14/65	2(a)	Roofing Asphalt	Subsequent investigation revealed facts which were inconsistent with those of the complainant, and new facts were basis of dismissal.	Dixon Elman MacIntyre Jones Reilly - Dissented
D. 7907 Celotex Corp. Trade Reg. Rep. (1965- 1967 Transfer Binder) Par. 17364.	12/15/65	2(a)	Roofing Asphalt	Subsequent investigation revealed facts which were inconsistent with those of the complainant, and new facts were basis of dismissal.	Dixon Elman MacIntyre Jones Reilly - Dissented
D. 7969 Emerson Radio Associates, Inc. Trade Reg. Rep. (1965- 1967 Transfer Binder) Par. 17237.	6/2/65	2(d)	TV Apparatus	Ceased the alleged practices and adequately assured FTC not to engage in such practices in future.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 7970 Jefferson-Travis, Inc., 61 FTC 966	10/10/62	2(a), 2(d)	TV Apparatus	Respondent divested itself of distribution business involved.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 7971 Indiv dualized Catalogs, Inc., et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 8068 Hruby Distributing Co., 61 FTC 1437	12/26/62	2(c)	Food Products	Majority held allowances to be functional discounts to an intermediate distributor so that he could be competitive.	Dixon Elman MacIntyre - Dissented Anderson - Did not participate Higginbotham - Did not participate
D. 8069 Sears Roebuck & Co., '62 Supp., 561	7/31/64	2(f)	Plumbing Fixtures	Plumbing fixtures sold by Sears were not of like grade and quality but were specially made for Sears.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 8095 Michigan Fruit Canners, Inc. 59 FTC 525	9/20/61	2(d)	Canned goods	Lack of evidence as to adverse effect on competition.	Dixon Elman Secret Anderson Kern - Unanimous
D. 8100 ATD Catalogs, Inc., et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous
D. 8112 Quaker Oats Co., 59 FTC 1487	11/18/64	2(a)	Food Products Flour-Oats	Failure of proof to show injury to competition.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 8120 American Bakeries Co., Trade Reg. Rep. (1965-1967 Transfer Binder) Par. 17283.	7/8/65	2(a), 2(d), 2(e)	Food Products Bakery	Staleness of evidence - five years old, not yet brought to trial.	Dixon Elman MacIntyre Jones Reilly - Unanimous
D. 8154 D. L. Clark Co., Trade Reg. Rep. (1963-1965 Transfer Binder) Par. 16487.	7/9/63	2(d)	Candy	Failure of proof of competition between favored and nonfavored customers.	Dixon Elman MacIntyre - Dissented Anderson Higginbotham

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 8176 Pastor & Gallagher Co. 59 FTC 1089	11/7/61	2 (d)	Food Products Coffee	Complete change in ownership and management since time of alleged violations.	Dixon Elman MacIntyre Anderson Kern - Unanimous
D. 8212 Arrow Food Products, Inc. 60 FTC 1771	6/26/62	2 (a)	Food Products Vegetables	No evidence that respondents engaged in systematic price differences through territorial price discrimination. Only dismissed as to primary line 2 (a) violations, 2 (a) secondary 2 (d) and 2(e) upheld in CAD Order.	Dixon Elman MacIntyre Anderson Kern - Unanimous
D. 8231 Santa's Official Toy Prevue, Inc., et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous
D. 8240 Billy & Ruth Promotion, Inc., et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous
D. 8255 United Variety Wholesalers, et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous
D. 8259 Santa's Playthings, Inc., et al.	7/14/69	FTCA § 5	Toys	The objectives of the complaints and orders could be better accomplished through industry enforcement proceedings, seeking voluntary compliance by industry with the Commission's advertising allowance guides. (Orders rescinded, complaints dismissed.)	Dixon Elman MacIntyre Jones Nicholson - Unanimous

Docket Number, Case Name and Citation	Date of Order	Discriminatory Practice (§)	Commodity	Reason for Order of Dismissal	Voting Record
D. 8294 Albert F. Robilio, et al. Doing business as Robilio & Cueno 59 FTC 1065	11/6/61	2(d)	Food Products Macaroni	Dismissed as to one respondent, who had no interest in partnership. He was merely executor of estate of one of the deceased partners.	Dixon - Unanimous Elman MacIntyre Anderson Kern
D. 8312 C. F. Sauer Co. 59 FTC 7	7/7/61	2(d)	Spices, oils, curative methods.	33 FTC 812; 828-829 inclusive - CED order already exists against this respondent and hence de novo adjudication is not needed.	Dixon - Unanimous Elman Secret Anderson Kern
D. 8487 General Electric Co. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 16317.	2/28/64	2(d)	Electrical equipment	Insufficient evidence - but staff warned to closely observe future promotional activities of respondent.	Dixon Elman MacIntyre Anderson Reilly - Dissented
D. 8501 Sylvania Electrical Products, Inc. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 17207.	2/24/65	2(d)	Photographic Lamps	Voluntary discontinuance of illegal practices and adequate assurances not to repeat.	Dixon - Unanimous Elman MacIntyre Jones Reilly
D. 8537 Shell Oil Co. Trade Reg. Rep. (1963- 1965 Transfer Binder) Par. 17175.	12/28/64	2(a)	Gasoline	Administrative discretion. Commission had begun comprehensive study of gasoline industry.	Dixon - Did not participate Elman MacIntyre Jones Reilly
D. 8544 Humble Oil & Refining Co. Trade Reg. Rep. (1965- 1967 Transfer Binder) Par. 17228.	5/28/65	2(a)	Gasoline	De minimis impact - Failure of proof	Dixon Elman MacIntyre Jones Reilly - Dissented

Docket Number and Name	Date of Order	Section	Commodity	Reason	Voting Record
7592 Ark-La-Tex	5/9/68 (Termination)	2(f)	Automobile Accessories	Company dissolved on May 1, 1963.	Dixon Elman MacIntyre Jones Nicholson - Unanimous
7709, 8273 Hood & Sons, Inc.	8/2/66 (Withdrawn)	2(a), (d)	Milk Products	Administrative discretion - Failure to have expeditious litigation withdrawn without prejudice.	Dixon Elman MacIntyre Jones Reilly - Did not participate
8502 Chemway Corp.	7/27/64 (Declaratory Findings & Orders)	2(d)	Toilet Preparations, Insecticides, Medicine.	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8503 d-Con Co., Inc.	7/27/64 (Declaratory Findings & Order)	2(d)	Insecticides, Deodorants, Shoe Polish, Lighter Fluid.	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8504 Hazel Bishop, Inc.	7/27/64 (Declaratory Findings & Order)	2(d)	Toilet Preparations.	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8505 Philip Morris, Inc.	7/27/64 (Declaratory Findings & Order)	2(d)	Razors, Razor Blades	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8506 Lehn & Fink Products Corp	7/27/64 (Declaratory Findings & Order)	2(d)	Disinfectants, Deodorants, Toilet Preparations	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous

Docket Number and Name	Date of Order	Section	Commodity	Reason	Voting Record
8507 B. T. Babbitt, Inc	7/27/64 (Declaratory Findings & Order)	2(d)	Cleansing Compounds, Hair Preparations	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8508 Young Rubber Co	7/27/64 (Declaratory Findings & Order)	2(d)	Prophylactics	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8491 Cheseborough Ponds, Inc TRR (193-65 Trans Binder) Par. 17 1007	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Toilet Preparations, Cosmetics	Administrative discretion - declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8492 Union Carbide Corp	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Batteries	Administrative discretion - declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8493 Becton, Dickinson & Co	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Surgical Instruments	Administrative discretion - declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8494 Warner-Lambert	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Curative Methods Medicine	Administrative discretion - declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly
8495 Julius Schmidt, Inc	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Prophylactics	Administrative discretion - declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon - Unanimous Elman MacIntyre Reilly

Docket Number and Name	Date of Order	Section	Commodity	Reason	Voting Record
8496 Mennen Co.	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Toilet Preparations	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8697 Eversharp, Inc.	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Razors	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8698 Sterling Drug, Inc.	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Toilet Preparations	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8699 Corn Products Co.	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Polish and Dyes	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8500 White Laboratories, Inc.	7/27/64 (C&D Order & Declaratory Findings)	2(d)	Drugs	Administrative discretion - Declaratory findings and order (based on respondent's assurance of discontinuance) to be considered a binding guide in future conduct.	Dixon Elman MacIntyre Reilly - Unanimous
8513 Atlantic Products Corp., et al.	1/26/65 (Declaratory Order)	2(d)	Luggage and Sporting Goods	Administrative discretion - "in order that the state may be wiped clean and that any new proceeding should not become entangled in the procedural complications which have encumbered and delayed the disposition of this case . . ."	Dixon Elman MacIntyre Jones Nicholson - Unanimous
8651 Associated Merchandising Corp., et al.	12/18/68 (Complaint Withdrawn)	2(f)	Merchandise Department Stores	Administrative discretion - "in order that the state may be wiped clean and that any new proceeding should not become entangled in the procedural complications which have encumbered and delayed the disposition of this case . . ."	Dixon Elman MacIntyre Jones Nicholson - Unanimous

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

[PUBLIC LAW 85-897, 85TH CONGRESS, APPROVED SEPTEMBER 2, 1958 (72 STAT. 1717; 15 U.S.C. 70), AS AMENDED BY PUBLIC LAW 89-35, 89TH CONGRESS, APPROVED JUNE 5, 1965 (79 STAT. 124).]

AN ACT To protect producers and consumers against misbranding and false advertising of the fiber content of textile fiber products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That this Act may be cited as the "Textile Fiber Products Identification Act".

Textile Fiber
Products
Identification
Act.

"Person."

DEFINITIONS (72 Stat. 1717; 15 U.S.C. 70).¹

SEC. 2. As used in this Act—

(a) The Term "person" means an individual, partnership, corporation, association, or any other form of business enterprise.

"Fiber."

(b) The term "fiber" or "textile fiber" means a unit of matter which is capable of being spun into a yarn or made into a fabric by bonding or by interlacing in a variety of methods including weaving, knitting, braiding, felting, twisting, or webbing, and which is the basic structural element of textile products.

"Natural fiber."

(c) The term "natural fiber" means any fiber that exists as such in the natural state.

"Manufactured
fiber."

(d) The term "manufactured fiber" means any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber.

"Yarn."

(e) The term "yarn" means a strand of textile fiber in a form suitable for weaving, knitting, braiding, felting, webbing, or otherwise fabricating into a fabric.

"Fabric."

(f) The term "fabric" means any material woven, knitted, felted, or otherwise produced from, or in com-

¹ The citations shown after each caption and the notes in the margin are insertions by the editors of this compilation.

bination with, any natural or manufactured fiber, yarn, or substitute therefor.

(g) The term "household textile articles" means articles of wearing apparel, costumes and accessories, draperies, floor coverings, furnishings, beddings, and other textile goods of a type customarily used in a household regardless of where used in fact.

"Household
articles."

(h) The term "textile fiber product" means—

"Textile fiber
product."

(1) any fiber, whether in the finished or unfinished state, used or intended for use in household textile articles;

(2) any yarn or fabric, whether in the finished or unfinished state, used or intended for use in household textile articles; and

(3) any household textile article made in whole or in part of yarn or fabric;

except that such term does not include a product required to be labeled under the Wool Products Labeling Act of 1939.

(i) The term "affixed" means attached to the textile fiber product in any manner.

"Affixed."

(j) The term "Commission" means the Federal Trade Commission.

"Commission."

(k) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation or between the District of Columbia and any State or Territory or foreign nation.

"Commerce."

(l) The term "Territory" includes the insular possessions of the United States, and also any Territory of the United States.

"Territory."

(m) The term "ultimate consumer" means a person who obtains a textile fiber product by purchase or exchange with no intent to sell or exchange such textile fiber product in any form.

"Ultimate
consumer."

MISBRANDING AND FALSE ADVERTISING DECLARED UNLAWFUL (72 Stat. 1718; 15 U.S.C. 70a).

SEC. 3. (a) The introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing

to be transported in commerce, or the importation into the United States, of any textile fiber product which is misbranded or falsely or deceptively advertised within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce, and which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, which is misbranded or falsely or deceptively advertised, within the meaning of this Act or the rules and regulations promulgated thereunder, is unlawful, and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(d) This section shall not apply—

(1) to any common carrier or contract carrier or freight forwarder with respect to a textile fiber product received, shipped, delivered, or handled by it for shipment in the ordinary course of its business;

(2) to any processor or finisher in performing a contract for the account of a person subject to the provisions of this Act if the processor or finisher does not change the textile fiber content of the textile fiber product contrary to the terms of such contract;

(3) with respect to the manufacture, delivery for transportation, transportation, sale, or offering for sale of a textile fiber product for exportation from the United States to any foreign country;

(4) To any publisher or other advertising agency or medium for the dissemination of advertising or

**Exemption as
to common
carrier.**

**Exemption as
to processor
or finisher.**

**Exemption as
to exports.**

**Exemption as
to advertising
medium.**

promotional material, except the manufacturer, distributor, or seller of the textile fiber product to which the false or deceptive advertisement relates, if such publisher or other advertising agency or medium furnishes to the Commission, upon request, the name and post-office address of the manufacturer, distributor, seller, or other persons residing in the United States, who caused the dissemination of the advertising material; or

(5) to any textile fiber product until such product has been produced by the manufacturer or processor in the form intended for sale or delivery to, or for use by, the ultimate consumer: *Provided*, That this exemption shall apply only if such textile fiber product is covered by an invoice or other paper relating to the marketing or handling of the textile fiber product and such invoice or paper correctly discloses the information with respect to the textile fiber product which would otherwise be required under section 4 of this Act to be on the stamp, tag, label, or other identification and the name and address of the person issuing the invoice or paper.

Exemption as
to unfinished
product.

MISBRANDING AND FALSE ADVERTISING OF TEXTILE FIBER PRODUCTS (72 Stat. 1719; 79 Stat. 124; 15 U.S.C. 70b).

SEC. 4. (a) Except as otherwise provided in this Act, a textile fiber product shall be misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

(b) Except as otherwise provided in this Act, a textile fiber product shall be misbranded if a stamp, tag, label, or other means of identification, or substitute therefor authorized by section 5, is not on or affixed to the product showing in words and figures plainly legible, the following:

Information
required
on label.

(1) The constituent fiber or combination of fibers in the textile fiber product, designating with equal prominence each natural or manufactured fiber in the textile fiber product by its generic name in the order of predominance by the weight thereof if the weight of such fiber is 5 per centum or more of the

total fiber weight of the product, but nothing in this section shall be construed as prohibiting the use of a nondeceptive trademark in conjunction with a designated generic name: *Provided*, That exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or the trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount contained in such product.²

(2) The percentage of each fiber present, by weight, in the total fiber content of the textile fiber product, exclusive of ornamentation not exceeding 5 per centum by weight of the total fiber content: *Provided*, That, exclusive of permissible ornamentation, any fiber or group of fibers present in an amount of 5 per centum or less by weight of the total fiber content shall not be designated by the generic name or trademark of such fiber or fibers, but shall be designated only as "other fiber" or "other fibers" as the case may be, but nothing in this section shall be construed as prohibiting the disclosure of any fiber present in a textile fiber product which has a clearly established and definite functional significance where present in the amount stated: ³ *Provided further*, That in the case of a textile fiber product which contains more than one kind of fiber, deviation in the fiber content of any fiber in such product from the amount stated on the stamp, tag, label, or other identification shall not be a misbranding under this section unless such deviation is in excess of reasonable tolerances which shall be established by the Commission: *And provided further*, That any such deviation which exceeds said tolerances shall not be a misbranding if the person charged proves that the deviation resulted from unavoidable variations in

² Public Law 89-35, 79 Stat. 124, amended Sec. 4(b)(1) as set forth above.

³ As amended by Public Law 89-35, 79 Stat. 124.

manufacture and despite due care to make accurate the statements on the tag, stamp, label, or other identification.

(3) The name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to section 3 with respect to such product.

(4) If it is an imported textile fiber product the name of the country where processed or manufactured.

(c) For the purposes of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised if any disclosure or implication of fiber content is made in any written advertisement which is used to aid, promote, or assist directly or indirectly in the sale or offering for sale of such textile fiber product, unless the same information as that required to be shown on the stamp, tag, label, or other identification under section 4(b) (1) and (2) is contained in the heading, body, or other part of such written advertisement, except that the percentages of the fiber present in the textile fiber product need not be stated.

False advertising of textile fiber product.

(d) In addition to the information required in this section, the stamp, tag, label, or other means of identification, or advertisement may contain other information not violating the provisions of this Act.

Additional information.

(e) This section shall not be construed as requiring the affixing of a stamp, tag, label, or other means of identification to each textile fiber product contained in a package if (1) such textile fiber products are intended for sale to the ultimate consumer in such package, (2) such package has affixed to it a stamp, tag, label, or other means of identification bearing, with respect to the textile fiber products contained therein, the information required by subsection (b), and (3) the information on the stamp, tag, label, or other means of identification affixed to such package is equally applicable with respect to each textile fiber product contained therein.

Packaged products.

(f) This section shall not be construed as requiring designation of the fiber content of any portion of fabric, when sold at retail, which is severed from bolts, pieces, or rolls of fabric labeled in accordance with the provisions of this section at the time of such sale: *Provided*, That if

Portions of fabrics.

any portion of fabric severed from a bolt, piece, or roll of fabric is in any manner represented as containing percentages of natural or manufactured fibers, other than that which is set forth on the labeled bolt, piece, or roll, this section shall be applicable thereto, and the information required shall be separately set forth and segregated as required by this section.

Fur fiber requirements.

(g) For the purposes of this Act, a textile fiber product shall be considered to be falsely or deceptively advertised if the name or symbol of any fur-bearing animal is used in the advertisement of such product unless such product, or the part thereof in connection with which the name or symbol of a fur-bearing animal is used, is a fur or fur product within the meaning of the Fur Products Labeling Act: *Provided, however,* That where a textile fiber product contains the hair or fiber of a fur-bearing animal, the name of such animal, in conjunction with the word "fiber", "hair", or "blend", may be used.

Reused fibers as stuffing.

(h) For the purposes of this Act, a textile fiber product shall be misbranded if it is used as stuffing in any upholstered product, mattress, or cushion after having been previously used as stuffing in any other upholstered product, mattress, or cushion, unless the upholstered product, mattress, or cushion containing such textile fiber product bears a stamp, tag, or label approved by the Commission indicating in words plainly legible that it contains reused stuffing.

REMOVAL OF STAMP, TAG, LABEL, OR OTHER IDENTIFICATION (72 Stat. 1720; 15 U.S.C. 70c).

Removal or mutilation of tags.

SEC. 5. (a) After shipment of a textile fiber product in commerce it shall be unlawful, except as provided in this Act, to remove or mutilate, or cause or participate in the removal or mutilation of, prior to the time any textile fiber product is sold and delivered to the ultimate consumer, any stamp, tag, label, or other identification required by this Act to be affixed to such textile fiber product, and any person violating this section shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, under the Federal Trade Commission Act.

(b) Any person—

(1) introducing, selling, advertising, or offering for sale, in commerce, or importing into the United States, a textile fiber product subject to the provisions of this Act, or

(2) selling, advertising, or offering for sale a textile fiber product whether in its original state or contained in other textile fiber products, which has been shipped, advertised, or offered for sale, in commerce.

may substitute for the stamp, tag, label, or other means of identification required to be affixed to such textile product pursuant to section 4(b), a stamp, tag, label, or other means of identification conforming to the requirements of section 4(b), and such substituted stamp, tag, label, or other means of identification shall show the name or other identification issued and registered by the Commission of the person making the substitution.

*Substitution
of label.*

(c) If any person other than the ultimate consumer breaks a package which bears a stamp, tag, label, or other means of identification conforming to the requirements of section 4, and if such package contains one or more units of a textile fiber product to which a stamp, tag, label, or other identification conforming to the requirements of section 4 is not affixed, such person shall affix a stamp, tag, label, or other identification bearing the information on the stamp, tag, label, or other means of identification attached to such broken package to each unit of textile fiber product taken from such broken package.

*Broken
packages.*

RECORDS (72 Stat. 1721; 15 U.S.C. 70d).

SEC. 6 (a) Every manufacturer of textile fiber products subject to this Act shall maintain proper records showing the fiber content as required by this Act of all such products made by him, and shall preserve such records for at least three years.

(b) Any person substituting a stamp, tag, label, or other identification pursuant to section 5(b) shall keep such records as will show the information set forth on the stamp, tag, label, or other identification that he removed and the name or names of the person or persons from whom such textile fiber product was received, and shall preserve such records for at least three years.

(c) The neglect or refusal to maintain or preserve the records required by this section is unlawful, and any person neglecting or refusing to maintain such records shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce, under the Federal Trade Commission Act.

ENFORCEMENT OF THE ACT (72 Stat. 1721; 15 U.S.C. 70e).

SEC. 7. (a) Except as otherwise specifically provided herein, this Act shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act.

(b) The Commission is authorized and directed to prevent any person from violating the provisions of this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating the provisions of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

(c) The Commission is authorized and directed to make such rules and regulations, including the establishment of generic names of manufactured fibers, under and in pursuant of the terms of this Act as may be necessary and proper for administration and enforcement.

(d) The Commission is authorized to cause inspections, analyses, tests, and examinations to be made of any product subject to this Act.

INJUNCTION PROCEEDINGS (72 Stat. 1721; 15 U.S.C. 70f).

SEC. 8. Whenever the Commission has reason to believe—

(a) that any person is doing, or is about to do, an act which by section 3, 5, 6, 9, or 10(b) is declared to be unlawful; and

(b) that it would be to the public interest to enjoin the doing of such act until complaint is issued by the Commission under the Federal Trade Commission Act and such complaint is dismissed by the Commission or set aside by the court on review or until an order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Territory, for the district or Territory in which such person resides or transacts business, to enjoin the doing of such act and upon proper showing a temporary injunction or restraining order shall be granted without bond.

EXCLUSION OF MISBRANDED TEXTILE FIBER PRODUCTS (72 Stat. 1722; 15 U.S.C. 70g).

SEC. 9. All textile fiber products imported into the United States shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of section 4 of this Act, and all invoices of such products required pursuant to section 484 of the Tariff Act of 1930, shall set forth, in addition to the matter therein specified, the information with respect to said products required under the provisions of section 4(b) of this Act, which information shall be in the invoices prior to their certification, if such certification is required pursuant to section 484 of the Tariff Act of 1930. The falsification of, or failure to set forth the required information in such invoices, or the falsification or perjury of the consignee's declaration provided for in section 485 of the Tariff Act of 1930, insofar as it relates to such information, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act; and any person who falsifies, or perjures the consignee's declaration insofar as it relates to such information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any textile fiber product into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this Act. A verified

statement from the manufacturer or producer of such products showing their fiber content as required under the provisions of this Act may be required under regulation prescribed by the Secretary of the Treasury.

GUARANTY (72 Stat. 1722; 15 U.S.C. 70h).

SEC. 10. (a) No person shall be guilty of an unlawful act under section 3 if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States by whom the textile fiber product guaranteed was manufactured or from whom it was received, that said product is not misbranded or falsely invoiced under the provisions of this Act. Said guaranty shall be (1) a separate guaranty specifically designating the textile fiber product guaranteed, in which case it may be on the invoice or other paper relating to said product; or (2) a continuing guaranty given by seller to the buyer applicable to all textile fiber products sold to or to be sold to buyer by seller in a form as the Commission, by rules and regulations, may prescribe; or (3) a continuing guaranty filed with the Commission applicable to all textile fiber products handled by a guarantor in such form as the Commission by rules and regulations may prescribe.

(b) The furnishing of a false guaranty, except where the person furnishing such false guaranty relies on a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the product guaranteed was manufactured or from whom it was received, is unlawful, and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce, within the meaning of the Federal Trade Commission Act.

CRIMINAL PENALTY (72 Stat. 1723; 15 U.S.C. 70i).

SEC. 11. (a) Any person who willfully does an act which by section 3, 5, 6, 9, or 10(b) is declared to be unlawful shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000 or be imprisoned not more than one year, or both, in the discretion of the court: *Provided*, That nothing in this section shall limit any other provision of this Act.

(b) Whenever the Commission has reason to believe that any person is guilty of a misdemeanor under this section, it may certify all pertinent facts to the Attorney General. If, on the basis of the facts certified, the Attorney General concurs in such belief, it shall be his duty to cause appropriate proceedings to be brought for the enforcement of the provisions of this section against such person.

EXEMPTIONS (72 Stat. 1723; 15 U.S.C. 70j).

SEC. 12. (a) None of the provisions of this Act shall be construed to apply to—

- (1) upholstery stuffing, except as provided in section 4(h);
- (2) outer coverings of furniture, mattresses, and box springs;
- (3) linings or interlinings incorporated primarily for structural purposes and not for warmth;
- (4) filling or padding incorporated primarily for structural purposes and not for warmth;
- (5) stiffenings, trimmings, facings, or interfacings;
- (6) backings of, and paddings or cushions to be used under, floor coverings;
- (7) sewing and handicraft threads;
- (8) bandages, surgical dressings, and other textile fiber products, the labeling of which is subject to the requirements of the Federal Food, Drug and Cosmetic Act of 1938, as amended;
- (9) waste materials not intended for use in a textile fiber product;
- (10) textile fiber products incorporated in shoes or overshoes or similar outer footwear;
- (11) textile fiber products incorporated in headwear, handbags, luggage, brushes, lampshades, or toys, catamenial devices, adhesive tapes and adhesive sheets, cleaning cloths impregnated with chemicals, or diapers.

The exemption provided for any article by paragraph (3) or (4) of this subsection shall not be applicable if any representation as to fiber content of such article is made in any advertisement, label, or other means of identification covered by section 4 of this Act.

(b) The Commission may exclude from the provisions of this Act other textile fiber products (1) which have an insignificant or inconsequential textile fiber content, or (2) with respect to which the disclosure of textile fiber content is not necessary for the protection of the ultimate consumer.

SEPARABILITY CLAUSE (72 Stat. 1723).

SEC. 13. If any provision of this Act, or the application thereof to any person, as that term is herein defined, is held invalid, the remainder of the Act and the application of the remaining provisions to any person shall not be affected thereby.

APPLICATION OF EXISTING LAWS (72 Stat. 1724; 15 U.S.C. 70k).

SEC. 14. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other Act of the United States.

EFFECTIVE DATE (72 Stat. 1724).

SEC. 15. This Act shall take effect eighteen months after enactment, except for the promulgation of rules and regulations by the Commission, which shall be promulgated within nine months after the enactment of this Act. The Commission shall provide for the exception of any textile fiber product acquired prior to the effective date of this Act.

Approved September 2, 1958.

[H. Rept. 986, 85th Cong., first sess.]

TEXTILE FIBER PRODUCTS IDENTIFICATION ACT

PURPOSE OF LEGISLATION

The basic purpose of this legislation is to provide consumers and producers of textile fiber products with truthful and informative labeling and advertising of the fiber content of such products. Other corollary objectives are: (1) to help the American farmer whose fiber product must compete with deceptively labeled and advertised synthetics which are lower priced and often of inferior quality compared with the natural fiber product but which frequently duplicate it in appearance, (2) to protect the producers of the quality synthetics against those producers of textiles who advertise their products deceptively, and (3) to protect the reliable textile manufacturer against the manufacturer who uses deceptive quality-cutting practices.

This bill is limited in scope to textile fiber products other than products which are required to be labeled under the Wool Products Labeling Act of 1939.

NEED FOR LEGISLATION

The need for this legislation was succinctly stated by Mr. Smith of Mississippi, the author of the bill, in his testimony before the committee during the hearings on this subject. Mr. Smith stated, in part, as follows:

"Today, rayon is the cheapest textile fiber. In many uses it serves quite satisfactorily. But in many others it lacks the basic characteristics essential for satisfactory performance—durability, launderability, strength. In many such uses, cotton is the traditional fiber. Cotton is almost synonymous with long wear, shrink resistance, and easy laundering.

"Recently there has been a concerted drive by some rayon producers to persuade textile mills to blend rayon with cotton in traditionally cotton articles. Unfortunately, a percentage of rayon in a cotton fabric doesn't generally change the appearance or even the feel of the fabric. If that fabric can be sold as an all-cotton fabric—and it usually can because it looks like cotton—the manufacturer can substantially increase his profit because his product is made of a substantially cheaper fiber. The consumer doesn't know that her "cotton" product is part rayon, and she doesn't find it out until the product shrinks out of shape, or wears out too soon, or proves unsatisfactory in some other fashion. And even then, in most cases, she doesn't blame the rayon blend because she doesn't know it is there. She simply concludes that cotton is not as good as it used to be.

"The damage in this chain is obvious—the cotton farmer suffers because cotton's reputation is put at question; the reliable manufacturer, who uses all cotton in the products he sells as all cotton, suffers because his products become suspect along with the others; the retailer suffers because he has sold an unreliable item, and the consumer suffers because she was led into paying her money for something she didn't get.

"The cotton farmer already faces a desperate fight for his markets. I do not believe he should be subjected, in addition to this type of competition. And I do not believe that the textile manufacturer, or the retailer, or the consumer, should be subjected to it. Eventually, as the textile competitors in self-preservation take the same avenue of cost cutting, the steadily decreasing quality of textile fabrics could very easily destroy public confidence in all textile products.

"All blends are not, of course, inferior products. Fiber blending is increasing rapidly in the textile industry and will continue to increase, as it should. New and different properties can be given to fabrics by blending two or more fibers together, properties which are both useful and desirable.

"But the qualities that result from blending depend not only on the types of fibers mixed together, but on the amount of each fiber included. This is another reason why the fiber content of textile fabrics should be disclosed.

"A good example of this is the blending of nylon with other fibers. Nylon has been called a miracle fiber, the first of an ever-growing collection of synthetic fibers of many important uses. It has proved to be one of the most wear-resistant of the textile fibers, and when blended with other fibers, it can significantly increase the life of the fabric. Nylon, however, is relatively expensive. In staple form it costs about \$1.35 a pound, against something like 29 cents for rayon. This has led to some rather astonishing practices in textile blending and advertising.

"The Du Pont Co., developer and major producer of nylon, states that generally the nylon content of a fabric must be at least 30 percent if the benefits of

nylon are to be realized in that fabric. In spite of that known fact, however, many textile articles have been put on the market and promoted as nylon products when the actual nylon content was sometimes as low as 1 percent. That amount of nylon does nothing but deceive the public.

"As in the case of the rayon-cotton blend, this practice hurts everyone along the line—the nylon producer, the honest textile manufacturer, the retailer, and the consumer.

"Much of the same thing is true of many of the other blending fibers like dacron and orlon. These fibers are blended, for the most part, to achieve certain properties—hand, wrinkle resistance, and texture. The producers of these fibers say that a fabric must contain at least 50 percent of these fibers to attain the desired results. Yet the price differential between these quality synthetics and the cheaper fibers is an open invitation to cut the expensive fiber in favor of the cheaper part of the blend.

"So long as the fiber content of textile fabrics is not required to be made known to the consumer, the industry cannot protect itself or its customers from cost-inspired, quality-cutting practices. And the consumer is left at the mercy of the manufacturer who elects to produce, to his own profit, a cheaper product that he can advertise on the basis of a promotionally valuable fiber—cotton, nylon, dacron, linen, silk, orlon—even though the product may not contain enough of these fibers to show any real benefit (hearings before a subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 85th Cong., 1st sess., on H. R. 469, H. R. 5605, and H. R. 6524, pp. 22-23)."

The committee shares the views expressed by Mr. Smith of Mississippi. We believe that the consumer has a right to know the fiber content of the textile fiber product which he is buying. Producers of quality merchandise should be protected against producers who use deceptive quality-cutting practices. We believe this protection can be achieved by requiring full disclosure of the fiber content of such merchandise.

FUR PRODUCTS LABELING ACT

[PUBLIC LAW 110, 82D CONGRESS, APPROVED AUGUST 8,
1951 (65 STAT. 175; 15 U.S.C. 69).]

AN ACT To protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Fur Products Labeling Act."

DEFINITIONS (65 Stat. 175; 15 U.S.C. 69).

SEC. 2. As used in this Act—

(a) The term "person" means an individual, partnership, corporation, association, business trust, or any organized group of any of the foregoing. "Person."

(b) The term "fur" means any animal skin or part thereof with hair, fleece, or fur fibers attached thereto, either in its raw or processed state, but shall not include such skins as are to be converted into leather or which in processing shall have the hair, fleece, or fur fiber completely removed. "Fur."

(c) The term "used fur" means fur in any form which has been worn or used by an ultimate consumer. "Used fur."

(d) The term "fur product" means any article of wearing apparel made in whole or in part of fur or used fur; except that such term shall not include such articles as the Commission shall exempt by reason of the relatively small quantity or value of the fur or used fur contained therein. "Fur product."

(e) The term "waste fur" means the ears, throats, or scrap pieces which have been severed from the animal pelt, and shall include mats or plates made therefrom. "Waste fur."

(f) The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who "Invoice."

is engaged in dealing commercially in fur products or furs.

"Commission."

"Federal Trade Commission Act."

"Fur Products Name Guide."

"Commerce."

"United States."

(g) The term "Commission" means the Federal Trade Commission.

(h) The term "Federal Trade Commission Act" means the Act entitled "An Act to create a Federal Trade Commission to define its powers and duties, and for other purposes," approved September 26, 1914, as amended.

(i) The term "Fur Products Name Guide" means the register issued by the Commission pursuant to section 7 of this Act.

(j) The term "commerce" means commerce between any State, Territory, or possession of the United States, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession or the District of Columbia.

(k) The term "United States" means the several States, the District of Columbia, and the Territories and possessions of the United States.

MISBRANDING, FALSE ADVERTISING, AND INVOICING DECLARED UNLAWFUL (65 Stat. 176; 15 U.S.C. 69a).¹

SEC. 3. (a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful

¹ The citations shown after each caption that precedes Sections 3 to 14 inclusive, and the notes in the margin of the Act, are insertions by the editors of this compilation.

and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(c) The introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur which is falsely or deceptively advertised or falsely or deceptively invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8(b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(d) Except as provided in subsection (e) of this section, it shall be unlawful to remove or mutilate, or cause or participate in the removal or mutilation of, prior to the time any fur product is sold and delivered to the ultimate consumer, any label required by this Act to be affixed to such fur product, and any person violating this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce under the Federal Trade Commission Act.

(e) Any person introducing, selling, advertising, or offering for sale, in commerce, or processing for commerce, a fur product, or any person selling, advertising, offering for sale or processing a fur product which has been shipped and received in commerce, may substitute for the label affixed to such product pursuant to section 4 of this Act, a label conforming to the requirements of such section, and such label may show in lieu of the name or other identification shown pursuant to section 4(2) (E) on the label so removed, the name or other identification of the person making the substitution. Any person substituting a label shall keep such records as will show the information set forth on the label that he removed and the name or names of the person or persons from whom such fur product was received, and shall preserve such records for at least three years. Neglect or refusal to maintain and preserve such records is unlawful, and any person who shall fail to maintain and preserve such records shall forfeit to the United States the sum of \$100 for each day of such failure which shall accrue to the United States and be recoverable by a civil action. Any person substituting a label who shall fail to keep and

*Removal
of label.*

*Substitute
labels.*

Penalty.

preserve such records, or who shall by such substitution misbrand a fur product, shall be guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce under the Federal Trade Commission Act.

Non-applicability.

(f) Subsections (a), (b), and (c) of this section shall not apply to any common carrier, contract carrier or freight forwarder in respect of a fur product or fur shipped, transported, or delivered for shipment in commerce in the ordinary course of business.

MISBRANDED FUR PRODUCTS (65 Stat. 177; 15 U.S.C. 69b).

SEC. 4. For the purposes of this Act, a fur product shall be considered to be misbranded—

(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or if the label contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product;

(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

(F) the name of the country of origin of any imported furs used in the fur product;

(3) if the label required by paragraph (2)(A) of this section sets forth the name or names of any animal or animals other than the name or names provided for in such paragraph.

FALSE ADVERTISING AND INVOICING OF FUR PRODUCTS AND FURS (65 Stat. 178; 15 U.S.C. 69c).

SEC. 5. (a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act;

(2) does not show that the fur is used fur or that the fur product contains used fur, when such is the fact;

(3) does not show that the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;

(4) does not show that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur;

(6) does not show the name of the country of origin of any imported furs or those contained in a fur product.

(b) For the purpose of the Act, a fur product or fur shall be considered to be falsely or deceptively invoiced—

(1) if such fur product or fur is not invoiced to show—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualify-

False
invoicing.

ing statement as may be required pursuant to section 7(c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name and address of the person issuing such invoice;

(F) the name of the country of origin of any imported furs or those contained in a fur product;

(2) if such invoice contains the name or names of any animal or animals other than the name or specified in paragraph (1)(A) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur.

EXCLUSION OF MISBRANDED OR FALSELY INVOICED FUR PRODUCTS OR FURS (65 Stat. 178; 15 U.S.C. 69d).

SEC. 6. (a) Fur products imported into the United States shall be labeled so as not to be misbranded within the meaning of section 4 of this Act; and all invoices of fur products and furs required under title IV of the Tariff Act of 1930, as amended, shall set forth, in addition to the matters therein specified, information conforming with the requirements of section 5(b) of this Act, which information shall be included in the invoices prior to their certification under the Tariff Act of 1930, as amended.

(b) The falsification of, or failure to set forth, said information in said invoices, or the falsification or perjury of the consignee's declaration provided for in the Tariff Act of 1930, as amended, insofar as it relates to said information, shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act; and any person who falsifies, or fails to set forth, said information in said invoices, or who falsifies or perjures said con-

signee's declaration insofar as it relates to said information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any fur products or furs into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said fur products and furs, and any duty thereon, conditioned upon compliance with the provisions of this section.

(c) A verified statement from the manufacturer, producer of, or dealer in, imported fur products and furs showing information required under the provisions of this Act may be required under regulations prescribed by the Secretary of the Treasury.

NAME GUIDE FOR FUR PRODUCTS (65 Stat. 179; 15 U.S.C. 69e).

SEC. 7. (a) The Commission shall, with the assistance and cooperation of the Department of Agriculture and the Department of the Interior, within six months after the date of the enactment of this Act, issue, after holding public hearings, a register setting forth the names of hair, fleece, and fur-bearing animals, which shall be known as the Fur Products Name Guide. The names used shall be the true English names for the animals in question, or in the absence of a true English name for an animal, the name by which such animal can be properly identified in the United States.

Fur Products
Name Guide,
issuance.

(b) The Commission may, from time to time, with the assistance and cooperation of the Department of Agriculture and the Department of the Interior, after holding public hearings, add to or delete from such register the name of any hair, fleece, or fur-bearing animal.

(c) If the name of an animal (as set forth in the Fur Products Name Guide) connotes a geographical origin or significance other than the true country or place of origin of such animal, the Commission may require whenever such name is used in setting forth the information required by this Act, such qualifying statement as it may deem necessary to prevent confusion or deception.

Clarification of
misleading
names.

ENFORCEMENT OF THE ACT (65 Stat. 179; 15 U.S.C. 69f).

SEC. 8. (a) (1) Except as otherwise specifically provided in this Act, sections 3, 6, and 10(b) of this Act shall

be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act.

(2) The Commission is authorized and directed to prevent any person from violating the provisions of sections 3, 6, and 10(b) of this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating any provision of section 3, 6, or 10(b) of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

Rules and regulations.

(b) The Commission is authorized and directed to prescribe rules and regulations governing the manner and form of disclosing information required by this Act, and such further rules and regulations as may be necessary and proper for purposes of administration and enforcement of this Act.

Inspections.

(c) The Commission is authorized (1) to cause inspections, analyses, tests, and examinations to be made of any fur product or fur subject to this Act; and (2) to cooperate, on matters related to the purposes of this Act, with any department or agency of the Government; with any State, Territory, or possession, or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

Records.

(d) (1) Every manufacturer or dealer in fur products or furs shall maintain proper records showing the information required by this Act with respect to all fur products or furs handled by him, and shall preserve such records for at least three years.

(2) The neglect or refusal to maintain and preserve such records is unlawful, and any such manufacturer or dealer who neglects or refuses to maintain and preserve such records shall forfeit to the United States the sum of \$100 for each day of such failure which shall accrue to the United States and be recoverable by a civil action.

CONDEMNATION AND INJUNCTION PROCEEDINGS
 (65 Stat. 180; 15 U.S.C. 69g).

SEC. 9. (a) (1) Any fur product or fur shall be liable to be proceeded against in the district court of the United States for the district in which found, and to be seized for confiscation by process of libel for condemnation, if the Commission has reasonable cause to believe such fur product or fur is being manufactured or held for shipment, or shipped, or held for sale or exchange after shipment, in commerce, in violation of the provisions of this Act, and if after notice from the Commission the provisions of this Act with respect to such fur product or fur are not shown to be complied with. Proceedings in such libel cases shall conform as nearly as may be to suits in rem in admiralty, and may be brought by the Commission.

Libel process.

(2) If such fur products or furs are condemned by the court, they shall be disposed of, in the discretion of the court, by destruction, by sale, by delivery to the owner or claimant thereof upon payment of legal costs and charges and upon execution of good and sufficient bond to the effect that such fur or fur products will not be disposed of until properly marked, advertised, and invoiced as required under the provisions of this Act; or by such charitable disposition as the court may deem proper. If such furs or fur products are disposed of by sale, the proceeds, less legal costs and charges, shall be paid into the Treasury of the United States as miscellaneous receipts.

(b) Whenever the Commission has reason to believe that—

(1) any person is violating, or is about to violate, section 3, 6, or 10(b) of this Act; and

(2) it would be to the public interest to enjoin such violation until complaint is issued by the Commission under the Federal Trade Commission Act and such complaint dismissed by the Commission or set aside by the court on review, or until order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Ter-

ritory, for the district or Territory in which such person resides or transacts business, to enjoin such violation, and upon proper showing a temporary injunction or restraining order shall be granted without bond.

GUARANTY (65 Stat. 181; 15 U.S.C. 69h).

SEC. 10. (a) No person shall be guilty under section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received, that said fur product is not misbranded or that said fur product or fur is not falsely advertised or invoiced under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the fur product or fur guaranteed, in which case it may be on the invoice or other paper relating to such fur product or fur; or (2) a continuing guaranty filed with the Commission applicable to any fur product or fur handled by a guarantor, in such form as the Commission by rules and regulations may prescribe.

(b) It shall be unlawful for any person to furnish, with respect to any fur product or fur, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the fur product or fur guaranteed was manufactured or from whom it was received) with reason to believe the fur product or fur falsely guaranteed may be introduced, sold, transported, or distributed in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

CRIMINAL PENALTY (65 Stat. 181; 15 U.S.C. 69i).

SEC. 11. (a) Any person who willfully violates section 3, 6, or 10(b) of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000, or be imprisoned not more than one year, or both, in the discretion of the court.

(b) Whenever the Commission has reason to believe any person is guilty of a misdemeanor under this section, it shall certify all pertinent facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of this section against such person.

APPLICATION OF EXISTING LAWS (65 Stat. 181; 15 U.S.C. 69j).

SEC. 12. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other Act of Congress.

SEPARABILITY OF PROVISIONS (65 Stat. 181).

SEC. 13. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE (65 Stat. 181).

SEC. 14. This Act, except section 7, shall take effect one year after the date of its enactment.

Approved August 8, 1951.

[S. Rept. 78, 82d Cong., first sess.]

FUR LABELING

Your committee believes that this legislation will contribute substantially to the stability and well-being of our growing fur-trade industry. According to testimony adduced at the hearings, the value of wild furs in 1948 totaled \$82,000,000. Farm-raised furs had a value of \$36,000,000. More than \$162,000,000 worth of raw fur was imported, making a total of \$281,000,000 in domestic and imported furs. The retail value of furs used in this country in 1948 was estimated at \$700,000,000.

The fur farmers of this country are wholeheartedly in favor of this legislation. They must have the protection it will afford them if they are to continue to provide the consumer with quality furs at the lowest possible price. The producers of fine merchandise are the ones who suffer when unscrupulous merchants indulge in false and misleading labeling and advertising practices. If our domestic fur industry is to be successful, it must produce first-quality fur animals and have the fur identified by its true name.

The enforcement provisions of this legislation closely follow those of the Wool Products Labeling Act; and, like that act, this bill will be administered by the Federal Trade Commission. In a letter to the chairman of your committee, which is set forth in full below for the information of the Senate, the Federal Trade Commission recommends the enactment of S. 508 and states:

"The administration of the proposed statute lends itself to be readily integrated with the Commission's duties under the Wool Products Labeling Act. With such in mind, its administration and enforcement would be considerably more economical than otherwise possible. Under such condition it is estimated that the cost of administering the act on a fiscal-year basis would approximate \$75,000."

The bill also has the approval of the Department of Agriculture, the Department of Commerce, and the Bureau of the Budget and has been cleared with the Treasury, Interior, and Justice Departments and the General Accounting Office.

The Secretary of Commerce, in a letter endorsing the objectives of this legislation, stated:

"Protection afforded manufacturers and consumers by the Wool Products Labeling Act of 1939 offers a cogent argument for the adoption of legislation to afford similar protection for manufacturers and consumers against similar unfair or deceptive acts or practices in the fur industry."

Your committee believes that this legislation is in the public interest and should be enacted into law. As stated by Representative Joseph P. O'Hara, of Minnesota, author of the companion House bill, when he appeared last year before your committee and urged the enactment of fur-labeling legislation:

"The effect of this bill will be to require honest, fair labeling and honest advertising, and will afford protection of a very substantial character, not only to the buying public but also to the industry and trades engaged in the fur business."

Although a product of nature, fur when offered and sold to the buying public often has had its natural appearance materially changed by processing and dyeing. While the dyeing or processing may improve the outward appearance of the product, it is usually done for the purpose of giving the article the appearance of being a fur of a higher quality or grade than it actually is, or for the purpose of imitating the more costly fur of an entirely different animal. Consequently, it is difficult and generally impossible for the American housewife to know what she is buying unless reliable factual information is disclosed to counteract the impression left with her as a result of the deceptive condition of the particular fur article of wearing apparel. When muskrat, for example, is dyed and processed to have the appearance of mink, the resemblance of the imitation to the genuine is so close as to be most deceptive in the absence of truthful disclosure revealing that fact that it is not mink but muskrat. In like fashion, rabbit is dyed and processed to imitate seal and many other furs. It was brought out at the hearings before your committee that rabbit fur has been sold under 50 other names, none of which revealed the fact that the fur actually was rabbit. During the hearings on this legislation the Federal Trade Commission introduced into the record a sampling of fur advertisements that appeared in newspapers throughout the country in 1949. This list, which comprised some 200 advertisements and which appears in the printed hearings at pages 41-47, demonstrates clearly the misleading and deceptive advertising which this legislation seeks to prevent.

FEDERAL TRADE COMMISSION,
Washington, January 23, 1951.

Hon. EDWIN C. JOHNSON,

*Chairman, Committee on Interstate and Foreign Commerce,
United States Senate, Washington, D.C.*

MY DEAR MR. CHAIRMAN: This is with further reference to your letter of January 17, 1951, enclosing a copy of S. 508, Eighty-second Congress, first session, entitled "A bill to protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs," introduced in the Senate of the United States on January 16, 1951, and requesting such comments thereon as the Commission may desire to make. In response thereto, I wish to advise that the bill has been carefully examined and the following comment is submitted by the Commission for the information of your committee.

* * * * *

In view of the circumstances and prevailing conditions in the fur industry, it is believed that legislation of the type provided by the bill under consideration would be beneficial and in the public interest.

The administration of the proposed statute lends itself to be readily integrated with the Commission's duties under the Wool Products Labeling Act. With such in mind, its administration and enforcement would be considerably more economical than otherwise possible. Under such condition it is estimated that the cost of administering the act on a fiscal-year basis would approximate \$75,000.

The Commission wishes to advise that members of its staff who are fully acquainted with the provisions of the bill will be available for any services they may be able to render the committee.

By direction of the Commission.

Sincerely yours,

JAS. M. MEAD, *Chairman.*

1. Value of wild domestic furs estimated at \$18.5 million (1967-1968).

Source: U.S. Department of the Interior, Bureau of Sport Fisheries and Wildlife and Bureau of Commercial Fisheries.

2. Value of domestic farm-raised furs—The Department of Agriculture is currently working on a census and have nothing significant on which to base an estimate. Mr. Emmet Hannawald, Chief, Livestock, Dairy and Poultry Statistics Branch, USDA (Code 111 X 2125).

3. Value of imported raw furs—\$91 million (1967); \$103 million (1968); \$94 million (1969).

Source: U.S. imports for consumption, Bureau of the Census, Department of Commerce.

4. Value of Retail Fur Trade:

(a) The 1967 Census of Business shows retail fur sales by furriers and fur shops at \$227 million in 1967. However, this does not include fur sales by department stores, variety shops, leased departments, etc.

(b) The 1967 Census of Manufactures shows value of shipments of fur goods manufactured by establishments producing fur coats, other fur garments, accessories and fur trimmings at \$332.8 million. It is estimated that the retail value of these goods would be about double or in the area of \$666 million.

Relatively accurate estimates of retail fur sales were available when the excise tax was in effect. However, this tax was repealed in June 1965.

FUR LABELING

JUNE 11, 1951.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. O'HARA, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 2321]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 2321) to protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments are as follows:

Page 5, line 17, strike out "or" and insert after the words "contract carrier" the following: "or freight forwarder".

Page 7, line 4, after "paragraph" strike out the comma and all that follows down through the word "processed" in line 6.

Page 8, line 6, strike out beginning with the word "unless" down through the comma in line 8.

Page 9, line 9, strike out beginning with the word "unless" down through the comma in line 11.

This proposed legislation has the approval of the Federal Trade Commission and the Department of Agriculture, as will appear from letters dated February 16, 1951, and April 12, 1951, respectively. These communications are printed below in this report.

GENERAL STATEMENT

The bill is designed to protect consumers and others from widespread abuses arising out of the frequent practice in the fur trade of using, in advertisements and otherwise, in a false or misleading manner, foreign animal names and glamorous, fictitious designations for furs and fur products.

The bill is generally modeled after the Wool Products Labeling Act of 1939 and requires mandatory invoicing of furs and labeling

of fur products moving in interstate or foreign commerce to show the name of the animal that produced the fur as set forth in the fur products name guide; the fact that the garment contains used fur if such is the case; the fact that the fur is dyed or bleached if such is the case; and the fact that the fur product is composed of paws, tails, bellies, or waste fur if such is the case. The bill further provides that furriers who manufacture fur products from furs received in interstate commerce shall be subject to the provisions of the act.

It further requires that when furs or fur products are advertised in such commerce, or after having been shipped and received in such commerce, these vital facts be truthfully stated in the advertising.

The bill makes it unlawful and declares it an unfair and deceptive act and practice within the meaning of the Federal Trade Commission Act to market in interstate or foreign commerce either furs or fur products which are not respectively invoiced and labeled to show the true name of the animal, and other factual information affecting the value of both furs and fur products.

¶ The legislation is to be administered by the Federal Trade Commission and its enforcement provisions closely follow those provided for in the Wool Products Act of 1939, which is administered by that agency. The bill further provides that the Federal Trade Commission shall set up a register of names known as Fur Products Name Guide which is to be used by the trade in complying with the provisions requiring the showing of the name of the animal whose fur is used.

In addition to the corrective action provided for by means of Federal Trade Commission cease-and-desist-order procedure, the bill also provides criminal penalties for willful violation of certain of its provisions.

The fur trade is a large and growing segment of American business. Latest available figures indicate that the American public is buying the output of this industry at the rate of \$500,000,000 a year.

While furs are natural products, they are peculiarly susceptible to dyeing and other manipulations and processing which tend to change their appearance. Such manipulations are commonly undertaken for the purpose of simulating more expensive furs in appearance. This practice makes it easily possible for the purchasing public to be misled and deceived. This legislation will go far toward protecting consumers.

Incidentally, this legislation affords protection to our domestic infant fur-farming industry. This industry breeds such high-grade fur animals as, for example, mink and silver fox. The use of the names of these animals, in a deceptive and misleading manner, in connection with cheap furs constitutes a method of competition which unduly burdens this industry. The legislation would make it unlawful to use the name of any animal other than the true name of the animal that produced the fur. While truthful and nondeceptive information and statements that are not required by the law to be placed on the label or in advertisements and invoices may be set forth in addition to the required information, the Commission, in order to prevent confusion and deception may issue regulations, pursuant to section 8 (b), governing the manner and form in which such nonrequired information and statements may appear. Thus, the use of such designation as, for example, "mink blended coney," which is rabbit fur processed to resemble mink, would constitute an unfair practice.

The Federal Trade Commission, in its work under the Federal Trade Commission Act, through its trade practice conference procedure, has endeavored to correct some of these practices. Many cases, have come before the Commission where correction has been obtained either through formal action or voluntary stipulation. However, these practices are so widespread and are of such a nature that specific legislation on the matter, such as is embodied in the bill, is considered necessary.

With respect to furs, the information required by this legislation is to be passed on by the means of invoices. In respect to fur products, labeling is required which begins with the manufacturer of the fur product. Removal of the required label is forbidden until the article reaches the ultimate consumer. However, a wholesaler or retailer who sells, advertises, or offers for sale in commerce, or processes for commerce, a fur product, may substitute his own label for that of the manufacturer.

LEGISLATIVE HISTORY DURING EIGHTIETH AND EIGHTY-FIRST CONGRESSES

A fur-labeling bill was introduced by Mr. O'Hara in the Eightieth Congress (H. R. 3734). Hearings were held on this bill by your committee on April 6 and 7, 1948. The bill was reported favorably with amendments (H. Rept. No. 2004, 80th Cong.).

During the Eighty-first Congress, new fur-labeling bills were introduced by Mr. O'Hara and Mr. Sadowski (H. R. 97 and H. R. 3755, respectively). Hearings were held on these two bills by your committee on May 11, 12, and 13, 1949. As a result of these hearings, a clean bill (H. R. 5187) was introduced by Mr. O'Hara, which was reported favorably by your committee (H. Rept. No. 919, 81st Cong.). H. R. 5187 passed the House on July 14, 1949. Hearings were held in the Senate on H. R. 5187, and it was reported favorably by the Senate Committee on Interstate and Foreign Commerce (S. Rept. 3278, 81st Cong.).

COMMITTEE AMENDMENTS

The bill here being reported to the House (H. R. 2321), as introduced, is substantially identical with the bill (H. R. 5187, 81st Cong.) passed by the House during the Eighty-first Congress.

The purpose of the amendments on pages 5, 7, and 8 is to remove from the bill provisions which would have permitted the use, in the labeling, advertising, or invoicing of a fur or fur product, of the name of any animal or animals other than the animal or animals from which the fur or fur product was produced, if such name was preceded by the words "Processed to simulate". As a result of these amendments, the bill will require that the labeling, advertising, or invoicing show only the name or names of the animal or animals from which the fur or fur product was produced. The committee feels that the objective of this bill of promoting truthful advertising, invoicing, and labeling of furs and fur products will be substantially furthered by these amendments.

The amendment on page 5 is merely to make it entirely clear that freight forwarders will get the benefit of the exemption granted to carriers.

SECTION BY SECTION EXPLANATION OF THE BILL AS AMENDED

Section 1 provides for a short title of the act which is "Fur Products Labeling Act."

Section 2 of the act contains definitions of terms used, including "commerce," "fur," "used fur," "waste fur," "fur products," and "invoice."

Section 3 declares that the marketing in commerce of any fur product that is misbranded or falsely or deceptively advertised and invoiced, shall be unlawful. In addition, the marketing in commerce of any furs that are falsely advertised or invoiced, shall be unlawful. Finally, the bill makes unlawful the marketing in commerce of any fur product that is misbranded or falsely or deceptively advertised or invoiced if such fur product has been made in whole or in part of fur which has been shipped and received in commerce. The mutilation of any label attached to a fur product is made unlawful but the section permits any person marketing fur products, in commerce, to attach a substitute label conforming to the requirements of the act and on such label he may set forth his own name in lieu of the name of the manufacturer. A person substituting a label is required to keep such records as will show the information set forth on the label that he removed and the name of the person from whom such fur product was received. This section exempts carriers, including freight forwarders, from operation of the act.

Section 4 provides that a fur product shall be misbranded if it is falsely or deceptively labeled or if a label is not affixed that does not show:

(1) The name of the animal producing the fur; (2) the name or identity of the manufacturer, shipper, or seller; and (3) the fact that a fur product contains used fur, that the fur is bleached or dyed, or that the fur product is made of waste fur or less valuable parts of the pelt, if any of these are the case. The section also provides that the name of no other animal except the animal that produced the fur shall appear on the label.

Section 5 provides that a fur product or fur shall be falsely advertised if it does not reveal the true English name of the animal producing the fur; and the fact, if such is the case, that it contains used fur, or that the fur is bleached or dyed, or that the fur product is made of waste fur or less valuable parts of the pelt. It also provides that the name of no other animal except that which produced the fur shall appear on the label. This section also makes unlawful the false invoicing of a fur product or fur, and provides that failure to furnish an invoice setting forth the information required by the act shall be considered false invoicing. It further provides that the name of no other animal shall appear on the invoice except the name of the animal that produced the fur.

Section 6 of the act has to do with imported fur products and furs, and provides for their exclusion under certain circumstances. This section also provides that the Secretary of the Treasury may require additional information under regulations prescribed by him.

Section 7 provides for the establishment of a fur products name guide which is to be issued within 6 months after the date of enactment of the act, and provides for the cooperation of the Departments of Agriculture and Interior in preparing such guide. Provision is

also made for amendment of the guide from time to time. Section 7 further provides that if the name of the animal set forth in the fur-products name guide connotes a geographical origin or significance other than the true country of origin of such animal, the Commission may require that such name be accompanied by a qualifying statement which will eliminate any confusion or deception as to the true country of origin of such animal. Where no true English name exists for an animal, the fur-products name guide is to set forth the name of the animal by which it can be properly identified in the United States.

Section 8 of the act provides that the Federal Trade Commission is to be the enforcing agency and shall provide the necessary rules and regulations. Provision is also made for inspections and tests, and that every manufacturer or dealer in fur products and furs shall maintain records.

Section 9 of the act provides for condemnation and injunction proceedings where the ordinary remedies would not be sufficient.

Section 10 provides for guaranties which may be either separate or continuing. These guaranties when relied upon in good faith would protect a person against charges under section 3 of the act.

Section 11 provides for certain criminal penalties when a willful violation occurs. Facts in such case are to be certified to the Attorney General for prosecution.

Sections 12, 13, and 14 contain provisions relating to application of existing laws, the effective date of the act (which is 1 year after enactment), and the separability clause.

FEBRUARY 16, 1951.

Hon. ROBERT CROSSEY,

Chairman, Committee on Interstate and Foreign Commerce,

United States House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: In response to your letter of February 5, 1951, enclosing a copy of H. R. 2321, Eighty-second Congress, first session, entitled "A bill to protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs," introduced on February 2, 1951, by Congressman Joseph P. O'Hara of Minnesota, and requesting any comments the Commission may care to offer concerning the proposed legislation, the following is submitted for the information of the committee.

The bill is generally modeled after the Wool Products Labeling Act of 1939. Its general objective is to protect consumers and scrupulous merchants against deception and unfair competition resulting from the misbranding, false or deceptive advertising, or false invoicing of fur products and furs, and to protect domestic fur producers against unfair competition.

The proposed legislation requires mandatory labeling of fur articles of wearing apparel and invoicing of furs moving in interstate or foreign commerce to show the name (as set forth in the Fur Products Name Guide) of the animal that produced the fur, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. It further requires that when fur products or furs are advertised in commerce that such important facts also be truthfully disclosed. Animal names other than the true name of the animal from which the fur was taken are prohibited from use on required labels, advertising, and invoicing "unless such name or names are preceded by the words 'processed to simulate' and the fur product has been so processed." (It is understood that the Commission under power granted in section 8 (b) of the act to prescribe rules and regulations governing the manner and form of disclosing information required by this act would have authority to control possible abuses which might arise under the above qualifying provision and thus afford necessary consumer protection.) The proposed legislation makes subject to its provisions not only those marketing fur products in interstate commerce, but those marketing fur products made in whole or in part of fur which has been shipped and received in commerce. The use of substitute labels is also provided for by those subject to the affirmative requirements of the bill.

In addition, the bill provides for the establishment and maintenance by the Federal Trade Commission, with the assistance and cooperation of the Departments of Agriculture and Interior, of a Fur Products Name Guide setting forth the true English names, or other appropriate animal names, to be used in labeling, invoicing, and advertising the respective furs from various animals. In connection with the name of an animal (as set forth in the Fur Products Name Guide) which connotes a geographical origin or significance other than the true country or place of origin of such animal, the proposed legislation provides that the Commission may require in connection therewith such qualifying statement as is necessary to prevent confusion or deception. (This provision is considered most necessary inasmuch as the proposed legislation in its present form contains no "country of origin" requirements.) The bill further provides for administration by the Federal Trade Commission in accordance with administrative procedure long operative in Commission work under comparable statutes; namely, the Federal Trade Commission Act and the Wool Products Labeling Act. It also provides for temporary injunctive relief as well as for actions in rem for seizure of misbranded fur products and furs which are in violation of the act. Separate or continuing guaranties are provided for where desired, for the protection of subsequent resellers. The use of false guaranties is declared unlawful. Together with the provisions for administrative enforcement by the Commission, the bill also provides for misdemeanor proceedings in district courts on behalf of the United States against willful violators of its provisions. The administrative enforcement provisions incorporated in the bill are of the type customarily found advisable and appropriate in legislation of this character and experience has proven such procedure most effective and of the type least burdensome.

Need for the proposed legislation is predicated upon the ever-increasing number of foreign names and fictitious designations used in advertising and in describing fur products and furs, which designations often appear quite confusing and misleading to potential purchasers as to the kind and quality of fur being offered for sale.

The proposed legislation would not only protect the consumer against such inroads of deception and false and misleading advertising but would also afford protection to our domestic infant fur-farming industry that it may be shielded from unscrupulous competition arising out of the use of false and glamorized designations for cheap imported furs.

While furs are natural products, they are peculiarly susceptible to dyeing and other manipulation and processing which tend to change their appearance. Such manipulations are commonly undertaken for the purpose of simulating more expensive furs in appearance. This practice makes it easily possible for the purchasing public to be misled and deceived, and the bill under consideration will go far toward protecting the unsuspecting consumers and dealers.

The bill goes considerably further in providing public protection in connection with the fur industry than appears possible under existing law and the Commission's Trade Practice Rules for the Fur Industry, two copies of which are enclosed herewith. While the operation of the Trade Practice Rules has afforded the public and business a material measure of protection, the bill would make it possible to effect even a wider and more thorough and complete protection. Thus, it is believed that the objectives of the bill would provide a valuable supplement to existing authority.

In view of the circumstances and prevailing conditions in the fur industry, it is believed that legislation of the type provided by the bill under consideration would be beneficial and in the public interest.

The administration of the proposed statute lends itself to be readily integrated with the Commission's duties under the Wool Products Labeling Act. With such in mind, its administration and enforcement would be considerably more economical than otherwise possible. Under such condition it is estimated that the cost of administering the act on a fiscal-year basis would approximate \$75,000.

The Commission wishes to advise that members of its staff who are fully acquainted with the provisions of the bill will be available for any services they may be able to render the committee.

By direction of the Commission.

Sincerely yours,

JAS. M. MEAD, *Chairman.*

N. B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on February 16, 1951, and on February 20, 1951, the Commission was advised that there would be no objection to the submission of the report to the committee.

W. A. AYRES, *Acting Chairman.*

DEPARTMENT OF AGRICULTURE,
Washington, D. C., April 12, 1951.

Hon. ROBERT CROSSER,

Chairman, Committee on Interstate and Foreign Commerce,

House of Representatives.

DEAR MR. CROSSER: This is in reply to your request of February 5, 1951, for a report on H. R. 2321, a bill to protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs.

The general intent of this bill is to guarantee the ultimate consumer and the handlers of furs and fur articles the kind of merchandise for which they pay. The stipulations are believed to be reasonable and generally workable. Under section 7 of the bill, the Department of Agriculture and the Department of the Interior are to assist and to cooperate with the Federal Trade Commission in preparing and keeping current the Fur Products Name Guide.

This bill is identical with H. R. 5187, Eighty-first Congress, which was passed by the House and on which the Department made a favorable report. The Department has also made favorable reports on similar bills, H. R. 2099 and S. 508, Eighty-second Congress, and has recommended amendments to section 7 of H. R. 538 which would provide for appropriate identification of animals that have names connoting a place of origin other than the true origin, in order to prevent confusion and deception.

There would be no additional cost to this Department if the bill should be enacted. Our present force is sufficient to assist the Federal Trade Commission.

The Department recommends that the bill be passed.

The Bureau of the Budget advises that from the standpoint of the program of the President there is no objection to the submission of this report.

Sincerely yours,

CHARLES F. BRANNAN, Secretary.

FLAMMABLE FABRICS ACT

(15 U.S.C. 1191; 67 Stat. 111) approved June 30, 1953; amended
(68 Stat. 770) August 23, 1954; amended and revised (81 Stat. 568)
December 14, 1967.

AN ACT To prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Section 1. This Act may be cited as the "Flammable Fabrics Act."

DEFINITIONS

Sec. 2 As used in this Act--

(a) The term "person" means an individual, partnership, corporation, association, or any other form of business enterprise.

(b) The term "commerce" means commerce among the several States or with foreign nations or in any territory of the United States or in the District of Columbia or between any such territory and another, or between any such territory and any State or foreign nation, or between the District of Columbia or the Commonwealth of Puerto Rico and any State or territory or foreign nation, or between the Commonwealth of Puerto Rico and any State or territory or foreign nation or the District of Columbia.

(c) The term "territory" includes the insular possessions of the United States and also any territory of the United States.

(d) The term "article of wearing apparel" means any costume or article of clothing worn or intended to be worn by individuals.

(e) The term "interior furnishing" means any type of furnishing made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used, in homes, offices, or other of places of assembly or accomodation.

(f) The term "fabric" means any material (except fiber, filament, or yarn for other than retail sale) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended for use or which may reasonably be expected to be used, in any product as defined in subsection (h).

(g) The term "related material" means paper, plastic, rubber, synthetic film, or synthetic foam which is intended for use or which may reasonably be expected to be used in any product as defined in subsection (h).

(h) The term "product" means any article of wearing apparel or interior furnishing.

- (i) The term "Commission" means the Federal Trade Commission.
- (j) The term "Federal Trade Commission Act" means the Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" approved September 26, 1914, as amended.

PROHIBITED TRANSACTIONS

Sec. 3 (a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or the sale or delivery after a sale or shipment in commerce, of any product, fabric, or related material which fails to conform to an applicable standard or regulation issued or amended under the provisions of section 4 of this Act, shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, the sale, or the offering for sale, of any product made of fabric or related material which fails to conform to an applicable standard or regulation issued or amended under section 4 of this Act, and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

REGULATION OF FLAMMABLE FABRICS

Sec. 4 (a) Whenever the Secretary of Commerce finds on the basis of the investigations or research conducted pursuant to section 14 of this Act that a new or amended flammability standard or other regulation, including labeling, for a fabric, related material, or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, he shall institute proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto for such fabric, related material, or product.

(b) Each standard, regulation, or amendment thereto promulgated pursuant to this section shall be based on findings that such standard, regulation, or amendment thereto is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms. Each such standard, regulation, or amendment thereto, shall become effective twelve months from the date on which such standard, regulation, or amendment is promulgated, unless the Secretary of Commerce finds for good cause shown that an earlier or later effective date is in the public interest and publishes the reason for such finding. Each such standard or regulation or amendment thereto shall exempt fabrics, related materials, or products in inventory or with the trade as of

the date on which the standard, regulation, or amendment thereto, becomes effective except that, if the Secretary finds that any such fabric, related material, or product is so highly flammable as to be dangerous when used by consumers for the purpose for which it is intended, he may under such conditions as the Secretary may prescribe, withdraw, or limit the exemption for such fabric, related material, or product.

(c) The Secretary of Commerce may obtain from any person by regulation or subpoena issued pursuant thereto such information in the form of testimony, books, records, or other writings as is pertinent to the findings or determinations which he is required or authorized to make pursuant to this Act. All information reported to or otherwise obtained by the Secretary or his representative pursuant to this subsection which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this Act or when relevant in any proceeding under this Act. Nothing in this section shall authorize the withholding of information by the Secretary or any officer or employee under his control, from the duly authorized committees of the Congress.

(d) The provisions of sections 551 through 559 of title 5, United States Code, shall apply to the issuance of all standards or regulations or amendments thereto under this section.

- (e) (1) Any person who will be adversely affected by any such standard or regulation or amendment thereto when it is effective may at any time prior to the sixtieth day after such standard or regulation or amendment thereto is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review thereof. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the standard or regulation, as provided in section 2112 of title 28 of the United States Code.
- (2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his

recommendations, if any, for the modification or setting aside of his original standard or regulation or amendment thereto, with the return of such additional evidence.

- (3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the standard or regulation in accordance with chapter 7 of title 5 of the United States Code and to grant appropriate relief as provided in such chapter.
 - (4) The judgment of the court affirming or setting aside, in whole or in part, any such standard or regulation of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28 of the United States code.
 - (5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.
 - (6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.
- (f) A certified copy of the transcript of the record and proceedings under subsection (e) shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this Act, irrespective of whether proceedings with respect to the standard or regulation or amendment thereto have previously been initiated or become final under subsection (e).

ADMINISTRATION AND ENFORCEMENT

Sec. 5 (a) Except as otherwise specifically provided herein, sections 3, 5, 6, and 8(b) of this Act shall be enforced by the Commission under rules, regulations and procedures provided for in the Federal Trade Commission Act.

(b) The Commission is authorized and directed to prevent any person from violating the provisions of section 3 of this Act in the same manner, by the same means and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating any provision of section 3 of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act. ^

(c) The Commission is authorized and directed to prescribe such rules and regulations, including provisions for maintenance of records relating to fabrics, related materials, and products, as may be necessary and proper for administration and enforcement of this Act. The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act.

(d) The Commission is authorized to--

(1) cause inspections, analyses, tests, and examinations to be made of any product, fabric or related material which it has reason to believe falls within the prohibitions of this Act; and

(2) cooperate on matters related to the purposes of this Act with any department or agency of the Government; with any State or territory or with the District of Columbia or the Commonwealth of Puerto Rico; or with any department, agency, or political subdivision thereof; or with any person.

INJUNCTION AND CONDEMNATION PROCEEDINGS

Sec. 6 (a) Whenever the Commission has reason to believe that any person is violating or is about to violate section 3, or a rule or regulation prescribed under section 5(c), of this Act, and that it would be in the public interest to enjoin such violation until complaint under the Federal Trade Commission Act is issued and dismissed by the Commission or until order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act or is set aside by the court on review, the Commission may bring suit in the district court of the United States, for the district in which such person resides or transacts business, or, if such person resides or transacts business in Guam or the Virgin Islands, then in the District Court of Guam or in the District Court of the Virgin Islands (as the case may be) to enjoin such violation and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(b) Whenever the Commission has reason to believe that any product has been manufactured or introduced into commerce or any fabric or related material has been introduced in commerce in violation of section 3 of this Act, it may institute proceedings by process of libel for the seizure and confiscation of such product, fabric, or related material in any district court of the United States within the jurisdiction of which such product, fabric, or related material is found. Proceedings in cases instituted under the authority of this section shall conform as nearly as may be to proceedings in rem in admiralty, except that on demand of either party and in the discretion of the court, any issue of fact shall be tried by jury. Whenever such proceedings involving identical products, fabrics, or related materials are pending in two or more jurisdictions, they may be consolidated for trial by order of any such court upon application seasonably made by any party in interest upon notice to all other parties in interest. Any court granting an order of consolidation shall cause prompt notification thereof to be given to other courts having jurisdiction in the cases covered thereby and the clerks of such other courts shall transmit all pertinent records and papers to the court designated for the trial of such consolidated proceedings.

(c) In any such action the court, upon application seasonably made before trial, shall by order allow any party in interest, his attorney or agent, to obtain a representative sample of the product, fabric, or related material seized.

(d) If such products, fabrics, or related materials are condemned by the court they shall be disposed of by destruction, by delivery to the owner or claimant thereof upon payment of court costs and fees and storage and other proper expenses and upon execution of good and sufficient bond to the effect that such products, fabrics, or related materials will not be disposed of until properly and adequately treated or processed so as to render them lawful for introduction into commerce, or by sale upon execution of good and sufficient bond to the effect that such products, fabrics, or related materials will not be disposed of until properly and adequately treated or processed so as to render them lawful for introduction into commerce. If such products, fabrics, or related materials are disposed of by sale the proceeds, less costs and charges, shall be paid into the Treasury of the United States.

PENALTIES

Sec. 7. Any person who willfully violates section 3 or 8(b) of this Act shall be guilty of a misdeameanor, and upon conviction thereof shall be fined not more than \$5,000 or be imprisoned not more than one year or both in the discretion of the court: Provided, That nothing herein shall limit other provisions of this Act.

GUARANTY

Sec. 8. (a) No person shall be subject to prosecution under section 7 of this Act for a violation of section 3 of this Act if such person (1) establishes a guaranty received in good faith signed by and containing the name and address of the person by whom the product, fabric, or related material guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made in accordance with standards issued or amended under the provisions of section 4 of this Act show that the fabric or related material covered by the guaranty, or used in the product covered by the guaranty, conforms with applicable flammability standards issued or amended under the provisions of section 4 of this Act, and (2) has not, by further processing, affected the flammability of the fabric, related material, or product covered by the guaranty which he received. Such guaranty shall be either (1) a separate guaranty specifically designating the product, fabric, or related material guaranteed, in which case it may be on the invoice or other paper relating to such product, fabric, or related material; (2) a continuing guaranty given by seller to buyer applicable to any product, fabric, or related material sold or to be sold to buyer by seller in a form as the Commission by rules and regulations may prescribe; or (3) a continuing guaranty filed with the Commission applicable to any product, fabric, or related material handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

(b) It shall be unlawful for any person to furnish, with respect to any product, fabric, or related material, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by

whom the product, fabric, or related material guaranteed was manufactured or from whom it was received) with reason to believe the product, fabric, or related material falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

SHIPMENTS FROM FOREIGN COUNTRIES

Sec. 9. An imported product, fabric, or related material to which flammability standards under this Act are applicable shall not be delivered from customs custody except as provided in section 499 of the Tariff Act of 1930, as amended. In the event an imported product, fabric, or related material is delivered from customs custody under bond, as provided in section 499 of the Tariff Act of 1930, as amended, and fails to conform with an applicable flammability standard in effect on the date of entry of such merchandise, the Secretary of the Treasury shall demand redelivery and in the absence thereof shall assert a claim for liquidated damages for breach of a condition of the bond arising out of such failure to conform or redeliver in accordance with regulations prescribed by the Secretary of the Treasury or his delegate. When asserting a claim for liquidated damages against an importer for failure to redeliver such nonconforming goods, the liquidated damages shall be not less than 10 per centum of the value of the nonconforming merchandise if, within five years prior thereto, the importer has previously been assessed liquidated damages for failure to redeliver nonconforming goods in response to a demand from the Secretary of the Treasury as set forth above.

INTERPRETATION AND SEPARABILITY

Sec 10. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other law. If any provision of this Act or the application thereof to any person or circumstances is held invalid the remainder of the Act and the application of such provisions to any other person or circumstances shall not be affected thereby.

EXCLUSIONS

Sec. 11. The provisions of this Act shall not apply (a) to any common carrier, contract carrier, or freight forwarder in transporting a product, fabric, or related material shipped or delivered for shipment into commerce in the ordinary course of its business; (b) to any converter, processor, or finisher in performing a contract or commission service for the account of a person subject to the provisions of this Act: Provided, That said converter, processor, or finisher does not cause any product, fabric, or related material to become subject to this Act contrary to the terms of the contract or commission service; or (c) to any product, fabric, or related material shipped or delivered for shipment into commerce for the purpose of finishing or processing

such product, fabric, or related material so that it conforms with applicable flammability standards issued or amended under the provisions of section 4 of this Act.

EFFECTIVE DATE

Sec. 12. This Act shall take effect one year after the date of its passage.

AUTHORIZATION OF APPROPRIATIONS

Sec. 13. There are hereby authorized to be appropriated \$1,500,000 for the fiscal year ending June 30, 1968, and \$2,500,000 each for the fiscal year ending June 30, 1969, and the fiscal year ending June 30, 1970, to carry out the provisions of this Act.

INVESTIGATIONS

Sec. 14. (a) The Secretary of Health, Education, and Welfare in cooperation with the Secretary of Commerce shall conduct a continuing study and investigation of the deaths, injuries, and economic losses resulting from accidental burning of products, fabrics, or related materials. The Secretary of Health, Education, and Welfare shall submit annually a report to the President and to the Congress containing the results of the study and investigation.

(b) In cooperation with appropriate public and private agencies, the Secretary of Commerce is authorized to--

- (1) conduct research into the flammability of products, fabrics, and materials;
- (2) conduct feasibility studies on reduction of flammability of products, fabrics, and materials;
- (3) develop flammability test methods and testing devices; and
- (4) offer appropriate training in the use of flammability test methods and testing devices.

The Secretary shall annually report the results of these activities to the Congress.

EXPORTS

Sec. 15. (a) This Act shall not apply to any fabric, related material, or product which is to be exported from the United States, if such fabric, related material, or product, and any container in which it is enclosed, bears a stamp or label stating that such fabric, related material, or product is intended for export and such fabric, related material, or product is in fact exported from the United States; except that this Act shall apply to any fabric, related material, or product manufactured for sale, offered for sale, or intended for shipment to any installation of the United States located outside of the United States.

(b) This Act shall not apply to any fabric, related material, or product which is imported into the United States for dyeing, finishing, other processing, or storage in bond, and export from the United

States, if such fabric, related material, or product, and any container in which it is enclosed, bears a stamp or label stating that such fabric, related material, or product is intended for export, and such fabric, related material, or product is in fact exported from the United States; except that this Act shall apply to any such imported fabric, related material, or product manufactured for sale, offered for sale, or intended for shipment to any installation of the United States located outside of the United States.

PREEMPTION

Sec. 16. This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions.

NATIONAL ADVISORY COMMITTEE FOR THE FLAMMABLE FABRICS ACT

Sec. 17. (a) The Secretary of Commerce shall appoint a National Advisory Committee for the Flammable Fabrics Act, composed of not less than nine members, fairly representative of manufacturers, distributors, and the consuming public. Each member appointed by the Secretary shall hold office for not more than two years, except that any member may be reappointed.

(b) Members of the Committee who are not officers or employees of the United States shall, while attending meetings or conferences of such Committee or otherwise engaged in the business of such Committee, be entitled to receive compensation at a rate fixed by the Secretary, but not exceeding \$100 per diem, including traveltimes, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized in section 5703 of title 5 of the United States Code for persons in the Government service employed intermittently. Payments under this section shall not render members of the Committee employees or officials of the United States for any purpose.

(c) The Secretary shall consult with the National Advisory Committee before prescribing flammability standards or other regulations established under this Act.

Note: Public Law 90-189, S. 1003, 90th Congress, 1st Session (81 Stat. 568), approved December 14, 1967, which amended and revised the Flammable Fabrics Act, contains a savings clause (81 Stat. 574) which reads:

Sec. 11. Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceding the date of enactment of this Act, shall continue in effect for the fabrics and articles of wearing apparel to which they are applicable until superseded or modified by the Secretary of Commerce pursuant to the authority conferred by the amendments made by this Act.

[H. Rept. 245, 83d Cong., first sess.]

PROHIBIT FLAMMABLE FABRICS IN INTERSTATE COMMERCE

HISTORY OF THE ACT

Congress enacted the Flammable Fabrics Act (which became effective on July 1, 1954), to protect the public from newly introduced highly flammable clothing, including "torch sweaters" and certain children's cowboy chaps. Congress set the level of protection by incorporating fixed standards of flammability into the act.

Every witness who testified before the committee, without exception, representing virtually all segments of the textile industries and trades, urged prompt and effective Federal legislation to protect the public from the dangers of highly flammable wearing apparel and fabrics used in wearing apparel, and supported these bills in principle. Moreover, the committee was urgently requested to take prompt action on this legislation. It was pointed out that if this legislation is not enacted, a variety of State and local regulations lacking in uniformity might very well ensue. It seems obvious that uniformity of regulation in this matter is necessary.

Testimony in support of legislation on this subject was received from the Federal Trade Commission, the National Cotton Council of America, the National Retail Dry Goods Association, the Tufted Textile Manufacturers Association, the Society of the Plastics Industry, the Rayon and Acetate Fiber Producers, and others.

NEED FOR THE LEGISLATION

Actual experiences in the past show that the risks and possibilities of bodily harm suffered by consumers in the use of highly flammable wearing apparel are severe and most dangerous. Still fresh in our minds is the great wave of burnings and even deaths which children have suffered when wearing highly flammable cowboy playuits. More recently, there have been a number of cases involving the so-called explosive sweaters which were sold to the public by itinerant vendors.

The Federal Trade Commission cited a number of these incidents. One man lost his sweater in flames while sitting in a courtroom. In another instance a man driving his automobile lit a cigarette which ignited his sweater. He succeeded in pulling it over his head but suffered second- and third-degree burns on his face, neck, and hands. His car jumped the curb and collided with a telephone pole. Instances of severe burns suffered by individuals were reported from many parts of the country. A General Motors employee reported that he lit a cigarette while wearing his new Christmas sweater and that four fellow employees saved his life by beating out the flame. He said:

"It was a terrifying thing. It was just as if you threw a match into a rag soaked with gasoline. There was that same 'poof' sound, and all of a sudden flames were all over me."

Other examples of the danger inherent in apparently innocent but nevertheless highly flammable wearing apparel were given by Dr. Frederic Bonnet, adviser to the president of the American Viscose Corp., when he testified in 1947 before this committee on similar proposed legislation. Here is his description of a few of these tragedies and near tragedies:

"Martha M. Goss, Kansas City, Mo., had a sweater patterned after angora, having long, fuzzy nap, purchased in Baltimore. The head of a match flew off against the sweater, igniting it. Her brother and sister came to her rescue and both were burned. She was very ill and suffered disfiguring scars and her hands were injured so that she could no longer follow her profession, which was that of a stenographer and secretary.

"I would like to add here that she sent a very pathetic letter to the National Bureau of Standards, and to other departments, asking whether something could not be done to prevent such accidents happening to others. She said it was all over with her case, but certainly life was still dear in America."

Then, we have the case of Doris E. Difffenbach who was injured when a cotton chenille dressing gown took fire.

Georgia Stevens, 18-year-old coed, was burned to death at a sorority initiation rite last spring at the University of Texas. It was a candlelight initiation and her gown brushed against a lighted candle. She died the next morning.

Virginia Black wore a white tulle dress at a coming-out dance at the St. Regis Hotel. The dress caught fire and she was severely burned. She is still in the hospital, I understand.

Angelica and Harry Murphy are bringing suit for \$125,000 because of some apron material, a coated fabric so highly flammable that when it came in proximity of a heated stove it took fire and severely burned her and her husband.

Mary Lee Cummings, aged 5, Whittier, Calif., was wearing a plastic raincape and backed into a radiant heater which ignited the plastic, causing second- and third-degree burns from which she died. That is the one that Mr. Dorn referred to in his testimony, and was reported by the California State fire marshal.

I need hardly refer you the twenty-odd boys 3 to 8 years of age who were burned, maimed, and 6 of whom died, as the result of burns sustained when their cowboy suits took fire.

The National Fire Protective Association records the following:

In Oakland, Calif., a girl died from burns received when her costume caught fire at a lodge entertainment.

In Magnolia, Ark., a Negro woman died from burns received when a grass dress caught fire from a can heater in a dressing room of a traveling minstrel show.

In Omaha, Nebr., a child dressed in an Indian costume which caught fire from the lighted jack-o'-lantern she was carrying. She suffered fatal burns.

I might add that children go to communion or confirmation carrying lighted candles, and have been injured.

In New Orleans on February 12, 1947, a bride, Mrs. Jess Rockenbaugh, was wearing a bathrobe which caught on fire. She was saved by her husband who cut the robe belt and pulled off the robe, but not before she suffered third-degree burns, and she is still in the hospital.

In Old Greenwich, Conn., a man's pajamas caught fire from the kitchen range. He suffered fatal burns. Those were cotton nap pajamas.

In Portland, Oreg., a man died of burns received when his trouser leg became ignited by a match. I do not know what he was wearing.

In Washington, D.C., a child's costume became ignited from a candle in a jack-o'-lantern. She was out in the yard when the accident occurred. She suffered fatal burns.

In Indianapolis, Ind., a woman pulled a light plug from a receptacle when a short circuit occurred, throwing sparks onto her dress. She suffered fatal burns.

In Yonkers, N.Y., a 4-year-old child was turned into a blazing torch as her Halloween costume was ignited by a jack-o'-lantern. She died in a hospital.

In Detroit, Mich., a man died of burns when his bathrobe caught fire when he was tending the furnace in his home.

In Denver, Colo., a woman suffered fatal burns when her clothing ignited while standing in front of a lighted fireplace.

I might mention a few others mentioned this morning. Namely: Mrs. Booth Tarkington was wearing some hair combs and was drying her hair in an ordinary hair dryer when she suffered severe burns owing to the ignition, spontaneous ignition, of those combs.

There was also a case of a woman sitting in front of a chafing dish wearing nitrocellulose buttons. These buttons practically exploded in her face and set her afire. She died of her injuries. This is given in Coronet under the heading of an article headed "Fire Trap."

I need not go on, I think with the recitation of these cases. They extend over many years. They have grown more numerous within recent years.

[S. Rept. 407, 90th Cong., first sess.]

FLAMMABLE FABRICS ACT AMENDMENTS OF 1967

The hazards caused by the flammability of clothing and other fabrics have long been known to the medical profession and fire protection agencies. Unfortunately, the general public has not fully comprehended the extent of the hazard—only the victim, his parents, and friends fully understand the painful, scarring consequences of human burns.

Each year thousands of men, women, and children are burned, many fatally, when their clothing accidentally catches fire. Thousands more are burned from bedding and other fabric fires.

The Public Health Service estimates that 1 million people are burned in the home each year; 150,000 persons suffer injuries as a result of the ignition of clothing.

The death toll from human burns is itself shocking—an estimated 2,000 to 3,000 each year. Deaths from fire rank third—behind traffic accidents and falls—as the chief cause of accidental deaths and injuries in this country.

Statistics on numbers burned, however, do not begin to reveal the magnitude of the problem. Many of the victims of fire do not die, but suffer second- and third-degree burns involving 10, 20, and even 30 percent of their bodies. They suffer anguish that can scarcely be described—let alone endured. If they survive, many of them are permanently disabled, or disfigured. Often the survival is achieved at the cost of medical and surgical treatments reckoned not in hundreds but in many thousands of dollars—and not in days or weeks but in many months of hospitalization.

Perhaps one of the most tragic aspects of these fabrics burns is that an unusually high proportion occur amongst those who are least able to help themselves—the aged, the disabled, the poor, and young children.

Calendar No. 39490TH CONGRESS
1st Session {

SENATE

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REPORT
No. 407**FLAMMABLE FABRICS ACT AMENDMENTS OF 1967**

JULY 25, 1967.—Ordered to be printed

Mr. MAGNUSON, from the Committee on Commerce, submitted the following

R E P O R T

[To accompany S. 1003]

The Committee on Commerce, to which was referred the bill (S. 1003) to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

PURPOSE AND BRIEF SUMMARY

The purpose of this bill as amended is to transform the limited terms of the Flammable Fabrics Act into a comprehensive fire safety law for all household and personal fabrics.

S. 1003 would (1) give the Secretary of Commerce authority to promulgate flammability standards or other appropriate regulations whenever he finds that such action is needed to protect the public interest, (2) extend the scope of the Flammable Fabrics Act to include all fabrics and related products, (3) direct the Secretary of Health, Education, and Welfare to conduct a comprehensive and continuing investigation of the deaths, injuries, and economic losses resulting from accidental burns, and (4) authorize the Secretary of Commerce to conduct research into the flammability of fabrics and related subjects.

BACKGROUND AND NEED

The legislation which the Commerce Committee unanimously reports today reflects the conviction of the committee that burns from ignition of clothing and other household fabrics clearly constitute an extremely serious health problem in the United States. The bill was introduced by Chairman Magnuson and cosponsored by Senators Williams of New Jersey, Pastore, Bartlett, Hartke, Hart, Cannon, Brewster, Moss, Cotton, Morton, Scott, and Prouty.

The hazards caused by the flammability of clothing and other fabrics have long been known to the medical profession and fire protection agencies. Unfortunately, the general public has not fully comprehended the extent of the hazard—only the victim, his parents, and friends fully understand the painful, scarring consequences of human burns.

Each year thousands of men, women, and children are burned, many fatally, when their clothing accidentally catches fire. Thousands more are burned from bedding and other fabric fires.

The Public Health Service estimates that 1 million people are burned in the home each year; 150,000 persons suffer injuries as a result of the ignition of clothing.

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Statistics on numbers burned, however, do not begin to reveal the magnitude of the problem. Many of the victims of fire do not die, but suffer second- and third-degree burns involving 10, 20, and even 30 percent of their bodies. They suffer anguish that can scarcely be described—let alone endured. If they survive, many of them are permanently disabled or disfigured. Often the survival is achieved at the cost of medical and surgical treatments reckoned not in hundreds but in many thousands of dollars—and not in days or weeks but in many months of hospitalization.

Perhaps one of the most tragic aspects of these fabrics burns is that an unusually high proportion occur amongst those who are least able to help themselves—the aged, the disabled, the poor, and young children.

HISTORY OF THE ACT

Congress enacted the Flammable Fabrics Act (which became effective on July 1, 1954), to protect the public from newly introduced highly flammable clothing, including "torch sweaters" and certain children's cowboy chaps. Congress set the level of protection by incorporating fixed standards of flammability into the act. These standards were stringent enough to halt the marketing of the highly flammable articles of clothing noted above, but did not affect the marketing of most materials and articles of clothing that were then—and are still now—commonly in use.

Although this act has served adequately to rid the country of so-called explosive clothing, the committee was confronted with evidence that the Flammable Fabrics Act may not provide the public with sufficient protection from other fabrics which may be shown to pose unreasonable risks of injury.

The committee hearings on S. 1003 identified four major deficiencies in the present Flammable Fabrics Act.

(1) The present law covers only certain articles of wearing apparel and fabrics from which they are made. This means that the public does not have legal protection for such items as blankets, bedding, drapes, carpets, upholstery, and other products and materials even if it were determined that they are unreasonably flammable. The present coverage of wearing apparel also is limited because it does not include hats, gloves, footwear, and inner linings.

(2) The present act incorporates two existing commercial standards—one for the flammability of clothing textiles and the other for general purpose vinyl film. There is no administrative authority to issue new flammability standards which would enable the Government to respond more promptly to the changing needs of industry and the consumer, the introduction of new fabrics and materials, the impact of new technology, or the identification of hazards in areas not now covered. Any time even a technical change is desirable to afford better protection, Congress must amend the act and consider each specific technical amendment.

(3) The present act does not provide for the development of reliable statistics to identify those products or fabrics which constitute a significant health hazard. A major obstacle in efforts to upgrade flammability standards has been the lack of reliable statistics on deaths, injuries, and economic loss caused by flammable fabrics. None of the public or private agencies concerned with fire hazards can say with certainty how many victims there are of fabric burnings. And there is no central clearinghouse where information can be combined and analyzed.

(4) The present act does not provide for investigation and research into the flammability of fabrics and for the development of improved testing methods. The hearings on the legislation revealed that the scientific information now available on the extent to which specific fabrics are associated with death and injuries resulting from burns is very limited. They also disclosed that there are severe limitations on our ability at present to mass produce fabrics with permanent or durable flame retardant characteristics. The committee believes that this legislation will help stimulate improvements in our existing technology and assure that the public will have the benefit of advances made possible by scientific research and investigation.

SCOPE OF THE BILL

This bill would extend the scope of the present Flammable Fabrics Act to include all items of wearing apparel and interior furnishings.

The critical definitions which delimit the scope of the bill are those for "wearing apparel" and "interior furnishings."

"Wearing apparel" is defined as "any costume or article of clothing worn or intended to be worn by individuals." This definition thus includes those items of wearing apparel which are exempted from the 1953 act such as hats, gloves, footwear, and inner linings.

"Interior furnishings" is defined as "any type of furnishing made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used, in homes, offices, or places of assembly."

Fabrics or related materials which are used for purposes other than those covered by the definitions of "wearing apparel" or "interior furnishings" would not come within the coverage of this bill. Thus, for example, the Flammable Fabrics Act would not be applicable to fabrics or related materials utilized in automobile interior furnishings which are covered by the provisions of the National Traffic and Motor Vehicle Safety Act of 1966.

FLAMMABILITY STANDARDS

This bill would give the Secretary of Commerce authority to issue appropriate new or revised standards of flammability for fabrics or related materials used in articles of wearing apparel or interior furnishings. Before the Secretary of Commerce can establish new or revised standards of flammability, however, he must first make a specific finding that a flammability standard or other appropriate regulation may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury or significant property damage. Any such finding must be based on the investigation or research to be conducted under section 14 of this bill by the Secretary of Commerce and the Secretary of Health, Education, and Welfare.

The bill provides "that each standard, regulation, or amendment thereto *** shall be based on findings that such standard, regulation or amendment is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technologically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms."

In determining whether a particular standard or regulation is "reasonable" or "appropriate" the committee intends that consideration be given to all pertinent factors, such as but not limited to, reduction of hazard, cost to the public, cost to industry, effect on durability and wearability, and the desirability of preserving consumer choice.

The bill gives the Secretary of Commerce power to subpoena relevant information on which to base such findings. The bill would, however, prevent disclosure of trade secrets and related material.

The bill provides that new or revised standards or regulations shall become effective 12 months from the date on which such standard, regulation, or amendment is promulgated, except that for good cause shown the Secretary may specify an earlier or later effective date.

The power to specify an earlier effective date is needed to enable the Secretary of Commerce to take prompt action if he finds that a particular fabric, related material, or product is so highly flammable as to be extremely dangerous when used by consumers for the purpose for which it is intended. In addition, the power to specify a later effective date is needed because it may be impractical from an economic and engineering standpoint, as well as a source of great hardship and unnecessary additional cost, to require adherence to new or revised standards within 1 year. The committee believes that most changes can be reasonably accomplished in 1 year. But when industry satisfies the Secretary of Commerce that a particular change cannot reasonably be accomplished within 1 year, the bill gives him discretion to extend the period.

The bill also provides an exemption for any fabric, related material, or product in inventory or with the trade as of the effective date of any standard, regulation, or amendment. This provision is designed to prevent retroactive application of any standard or regulation or amendment to any fabric, related material, or product in the manufacturing "pipeline" or in the economy including previously manufactured goods as of the effective date of such standard or regulation.

or amendment. This exemption, however, may be withdrawn or limited by the Secretary of Commerce in situations in which he finds that a particular fabric, related material, or product is so highly flammable as to be dangerous when used by consumers for the purpose for which it is intended. In such unusual circumstances, the Secretary is authorized to withdraw or limit the exemption.

The bill is intended to assure that the Secretary will promulgate only such new or amended standards or regulations as may be necessary and appropriate to carry out the purposes of the legislation. Any new standard or other regulation would have to be tailored to meet the particular need or hazard shown to exist consistently with the criteria set forth in the bill. For example, if an appropriate regulation for children's clothing was shown to be needed and deemed to be effective, such regulation could be promulgated for children's clothing without imposing the same requirement on all other wearing apparel.

PROCEDURES FOR THE PROMULGATION OF FLAMMABILITY STANDARDS

The bill provides similarly to the National Traffic and Motor Vehicle Safety Act of 1966 that the provisions of the Administrative Procedures Act shall apply to the issuance of all standards or regulations or amendments. In addition, the bill similarly specifies procedures for judicial review by any person who will be adversely affected by any standard or regulation or amendment when it is effective. The language of this section makes it clear that proceedings for such review may be instituted regardless of whether any action has been taken to enforce or implement the standard or regulation or amendment.

The provisions of the Administrative Procedures Act are intended to afford fair procedures to persons involved in administrative agency proceedings. They also serve to assure that administrative decisions will be based on evidence and other relevant information, rather than on conjecture and assumptions. Under these procedures, interested parties will be given an opportunity for a hearing and in the event the Secretary's action is challenged, the courts will have to determine whether the Secretary's findings are supported by substantial evidence. In the view of the committee, these procedural safeguards will strengthen the bill by making certain that whatever action is taken will be based on a proper record and impartial deliberation.

RECORDKEEPING

The bill would give the Federal Trade Commission clear authority to require maintenance of records concerning items that could be used for "interior furnishings" or "wearing apparel" purposes. The committee recognizes that excessive recordkeeping imposes an undue burden on industry. The committee intends, therefore, that these recordkeeping requirements be held to the minimum necessary to administer and enforce the act.

IMPORTS

Section 8 of the bill tightens the existing sanctions against the importation of fabrics, related materials, or products which do not conform to the requirements of the Flammable Fabrics Act. This

section modifies slightly the application of section 499 of the Tariff Act of 1930 to flammable fabrics by limiting the Secretary of Treasury's discretion to compromise damages. It provides that when the Secretary of Treasury asserts a claim for liquidated damages against an importer for failure to redeliver nonconforming goods, the liquidated damages shall be not less than 10 percent of the value of the nonconforming merchandise if, within 5 years prior thereto, the importer has previously been assessed liquidated damages for failure to redeliver nonconforming goods in response to a demand from the Secretary of Treasury. In accordance with standard customs procedures, the review procedures available under section 515 of the Tariff Act of 1930 will be available and apply to proceedings for forfeiture of bond arising from alleged violations of section 8 of this bill.

Because of the difficulty of obtaining jurisdiction over foreign exporters, the section eliminates the present provision of the Flammable Fabrics Act (sec. 9) making the prohibition against the importation of nonconforming fabrics applicable to the foreign exporter. However, this will not effect the applicability to any person of any of the sanctions provided in other sections of the bill for violation of its provision.

INVESTIGATIONS AND RESEARCH

The committee bill would add a new section to the Flammable Fabrics Act to authorize investigations and research. The Secretary of Health, Education, and Welfare in cooperation with the Secretary of Commerce would conduct a continuing study and investigation of the deaths, injuries, and economic losses resulting from the accidental burning of products, fabrics, or related materials.

The Secretary of Commerce would also be authorized to conduct research into the flammability of fabrics, related materials, and products, including all aspects of their various ways of burning, the products given off during burning, and the feasibility of reducing their rates or intensities of burning. In addition, the Secretary would develop flammability test methods and test devices, and offer appropriate training in the use of flammability test methods and test devices.

The results of these studies and investigations would be reported annually to the President and the Congress.

In conducting his research functions, the committee intends that the Secretary of Commerce cooperate with other public and private agencies including the Department of Agriculture whose Southeast Regional Laboratory has long pioneered in the development of flame-retardant fabrics and chemicals.

EXPORTS

The committee bill explicitly provides that the Flammable Fabrics Act would not be applicable to any fabric, related material, or product intended solely for export and so labeled or tagged if they are actually exported. The committee believes that it would not be appropriate to impose flammability standards or other regulations on exports due to widespread differing conditions which exist in foreign nations.

EFFECT ON STATE LAW

The mass production, high volume, and national marketing character of the textile industry requires that flammability standards be uniform throughout the country. Accordingly, the bill would preempt any law of any State or political subdivision thereof which is inconsistent with its provision.

This bill would not affect the State's ability to set more stringent requirements for their own procurement and for State and local fire building codes. However, it would avoid multiple regulation of manufacturers covered by the Federal law.

NATIONAL ADVISORY COMMITTEE

In view of the complexity and difficulty of the subject matter covered by this bill, the committee concluded that it would be desirable to establish a national advisory committee with which the Secretary of Commerce would consult in carrying out his responsibilities. The committee would consist of not less than nine members fairly representative of industry, distributor, and consumer groups. The term "distributor" refers to those engaged in wholesale or retail distribution or sales of the products affected, including importers.

The Secretary would be required to consult with the National Advisory Committee before the final promulgation of any standard, regulation, or amendment but would not be bound to follow the recommendations of the National Advisory Committee. The Secretary, of course, could consult with the National Advisory Committee on any other matters relating to the subject matter of the legislation.

SAVINGS CLAUSE

The present Flammable Fabrics Act contains flammability standards for certain articles of wearing apparel. This bill contains a savings clause which explicitly provides that the present standards of flammability shall continue in effect until superseded or modified only "for the articles of wearing apparel to which they are applicable."

COSTS

The Department of Commerce estimates that the bill will require \$976,000 in additional funds for the first year's administration, while the Department of Health, Education, and Welfare estimates that its responsibilities under the bill will entail an additional \$964,000 per year.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

FLAMMABLE FABRICS ACT

(Approved June 30, 1953; 67 Stat. 111; 15 U.S.C. 1191)

AN ACT To prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Flammable Fabrics Act".

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "person" means an individual, partnership, corporation, association, or any other form of business enterprise.

(b) The term "commerce" means commerce among the several States or with foreign nations, or in any [T]territory of the United States or in the District of Columbia, or in the Commonwealth of Puerto Rico, or between any such [T]territory and another, or between any such [T]territory and any State or foreign nation, or between the District of Columbia or the Commonwealth of Puerto Rico, and any State or [T]territory or foreign nation, or between the Commonwealth of Puerto Rico and any State or territory or foreign nation or the District of Columbia.

(c) The term "[T]territory" includes the insular possessions of the United States and also any [T]territory of the United States.

(d) The term "article of wearing apparel" means any costume or article of clothing worn or intended to be worn by individuals [except hats, gloves, and footwear: *Provided, however,* That such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals: *Provided further,* That such gloves are not more than fourteen inches in length and are not affixed to or do not form an integral part of another garment: *And provided further,* That such footwear does not consist of hosiery in whole or in part and is not affixed to or does not form an integral part of another garment].

(e) The term "interior furnishings" means any type of furnishing made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used, in homes, offices, in places of assembly.

[e] (f) The term "fabric" means any material ([other than]) except fiber, filament or yarn for other than retail sale) woven, knitted, felted, or otherwise produced from or in combination with any natural or synthetic fiber, film, or substitute therefor which is intended [or sold] for use or which may reasonably be expected to be used, in [wearing

apparel except that interlining fabrics when intended or sold for use in wearing apparel shall not be subject to this Act] *any product as defined in subsection (h).*

[(f) The term "interlining" means any fabric which is intended for incorporation into an article of wearing apparel as a layer between an outer shell and an inner lining.]

(a) *The term "related material" means paper, plastic, rubber, synthetic film, or synthetic foam which is intended for use or which may reasonably be expected to be used, in any product as defined in subsection (h).*

(h) *The term "product" means any article of wearing apparel or interior furnishing.*

[(g) (i) The term "Commission" means the Federal Trade Commission.

[(h)] (i) *The term "Federal Trade Commission Act" means the Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes" approved September 26, 1914, as amended.*

PROHIBITED TRANSACTIONS

SEC. 3. (a) The manufacture for sale, the sale, or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported, in commerce, or [for the purpose of] the sale or delivery after a sale or shipment in commerce, of any [article of wearing apparel which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals.] *product which fails to conform to an applicable standard issued or amended under the provisions of section 4 of this Act,* shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(b) The sale or the offering for sale, in commerce, or the importation into the United States, or the introduction, delivering for introduction, transportation or causing to be transported, in commerce, or [for] the [purpose of] sale or delivery after a sale or sale or shipment in commerce of any fabric [which under the provisions of section 4 of this Act is so highly flammable as to be dangerous when worn by individuals] *or related material which fails to conform to an applicable standard issued or amended under the provisions of section 4 of this Act,* shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

(c) The manufacture for sale, the sale, or the offering for sale, of any [article of wearing apparel made of fabric which under section 4 is so highly flammable as to be dangerous when worn by individuals.] *product made of fabric as related material which fails to conform to an applicable standard issued or amended under section 4 of this Act,* and which has been shipped or received in commerce shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

[STANDARD OF FLAMMABILITY]

[SEC. 4. (a) Any fabric or article of wearing apparel shall be deemed so highly flammable within the meaning of section 3 of this Act as to be dangerous when worn by individuals if such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the Commercial Standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53," or exhibits a rate of burning in excess of that specified in paragraph 3.11 of the Commercial Standard promulgated by the Secretary of Commerce effective May 22, 1953, and identified as "General Purpose Vinyl Plastic Film, Commercial Standard 192-53." For the purposes of this Act, such Commercial Standard 191-53 shall apply with respect to the hats, gloves, and footwear covered by section 2(d) of this Act, notwithstanding any exception contained in such Commercial Standard with respect to hats, gloves, and footwear.

[b) If at any time the Secretary of Commerce finds that the Commercial Standards referred to in subsection (a) of this section are inadequate for the protection of the public interest, he shall submit to the Congress a report setting forth his findings together with such proposals for legislation as he deems appropriate.

[c) Notwithstanding the provisions of paragraph 3.1 Commercial Standard 191-53, textiles free from nap, pile, tufting, flock, or other type of raised fiber surface when tested as described in said standard shall be classified as class 1, normal flammability, when the time of flame spread is three and one-half seconds or more, and as class 3, rapid and intense burning, when the time of flame spread is less than three and one-half seconds.]

REGULATION OF FLAMMABLE FABRICS

SEC. 4. (a) Whenever the Secretary of Commerce finds on the basis of the investigations or research conducted pursuant to section 14 of this Act that a new or amended flammability standard or other regulation, including labeling, for a fabric, related material or product may be needed to protect the public against unreasonable risk of the occurrence of fire leading to death or personal injury, or significant property damage, he shall institute proceedings for the determination of an appropriate flammability standard (including conditions and manner of testing) or other regulation or amendment thereto for such fabric, related material or product.

(b) Each standard, regulation or amendment thereto promulgated pursuant to this section shall be based on determinations that such standard, regulation or amendment thereto is needed to adequately protect the public against unreasonable risk of the occurrence of fire leading to death, injury, or significant property damage, is reasonable, technically practicable, and appropriate, is limited to such fabrics, related materials, or products which have been determined to present such unreasonable risks, and shall be stated in objective terms. Each standard, regulation, or amendment thereto, shall become effective twelve (12) months from the date on which such standard, regulation, or amendment is promulgated, unless the Secretary of Commerce finds for good cause shown that an earlier or later effective date is in the public interest and

publishes the reason for such finding. Each standard or regulation or amendment thereto shall exempt fabrics, related materials or products in inventory or with the trade as of the date on which the standard, regulation, or amendment thereto, becomes effective except that, if the Secretary finds that any such fabric, related material or product is so highly flammable as to be dangerous when used by consumers for the purpose for which it is intended, he may under such conditions as the Secretary may prescribe, withdraw or limit the exemption for such fabric, related material or product.

(c) *The Secretary of Commerce may obtain from any person by regulation or subpoena issued pursuant thereto such information in the form of testimony, books, records, or other writings as is pertinent to the findings or determinations which he is required or authorized to make pursuant to this Act. All information reported to or otherwise obtained by the Secretary or his representative pursuant to this subsection which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 of the United States Code, shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this title or when relevant in any proceeding under this title. Nothing in this section shall authorize the withholding of information by the Secretary or any officer or employee under his control, from the duly authorized committees of the Congress.*

(d) *The Administrative Procedure Act shall apply to the issuance of all standards or regulations or amendments thereto under this section.*

(e)(1) *Any person who will be adversely affected by such standard or regulation or amendment thereto when it is effective may at any time prior to the sixtieth day after such standard or regulation or amendment thereto is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review thereof. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the standard or regulation, as provided in section 2112 of title 28 of the United States Code.*

(2) *If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original standard or regulation or amendment thereto, with the return of such additional evidence.*

(3) *Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the standard or regulation in accordance with chapter 7 of title 5 of the United States Code and to grant appropriate relief as provided in such chapter.*

(4) *The judgment of the court affirming or setting aside, in whole or in part, any such standard or regulation of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or*

certification as provided in section 1254 of title 28 of the United States Code.

(5) *Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary of any vacancy in such office.*

(6) *The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.*

(f) *A certified copy of the transcript of the record and proceedings under subsection (e) shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this Act, irrespective of whether proceedings with respect to the standard or regulation or amendment thereto have previously been initiated or become final under subsection (e).*

ADMINISTRATION AND ENFORCEMENT

SEC. 5. (a) Except as otherwise specifically provided herein, sections 3, 5, 6, and 8 (b) of this Act shall be enforced by the Commission under rules, regulations and procedures provided for in the Federal Trade Commission Act.

(b) The Commission is authorized and directed to prevent any person from violating the provisions of section 3 of this Act in the same manner, by the same means and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating any provision of section 3 of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

(c) The Commission is authorized and directed to prescribe such rules and regulations, *including provisions for maintenance of records relating to fabrics, related materials and products*, as may be necessary and proper for [purposes of] administration and enforcement of this Act. *The violation of such rules and regulations shall be unlawful and shall be an unfair method of competition and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act.*

(d) The Commission is authorized to—

(1) cause inspections, analyses, tests and examinations to be made of any [article of wearing apparel] product, fabric or related material which it has reason to believe falls within the prohibitions of this Act; and

(2) cooperate on matters related to the purposes of this Act with any department or agency of the Government; with any State, Territory, or possession or with the District of Columbia, or with any department, agency, or political subdivision thereof; or with any person.

INJUNCTION AND CONDEMNATION PROCEEDINGS

SEC. 6. (a) Whenever the Commission has reason to believe that any person is violating or is about to violate section 3, or subsections (c) or (e) of section 5, of this Act, and that it would be in the public

interest to enjoin such violation until complaint under the Federal Trade Commission Act is issued and dismissed by the Commission or until order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act or is set aside by the court on review, the Commission may bring suit in the district court of the United States or in United States court of any Territory for the district or Territory in which such person resides or transacts business, to enjoin such violation and upon proper showing a temporary injunction or restraining order shall be granted without bond.

(6) Whenever the Commission has reason to believe that any [article of wearing apparel] product has been manufactured or introduced into commerce or any fabric or related material has been introduced in commerce in violation of section 3 of this Act, it may institute proceedings by process of libel for the seizure and confiscation of such [article of wearing apparel or fabric] product, fabric, or related material in any district court of the United States within the jurisdiction of which such [article of wearing apparel or fabric] product, fabric, or related material is found. Proceedings in cases instituted under the authority of this section shall conform as nearly as may be to proceedings in rem in admiralty, except that on demand of either party and in the discretion of the court, any issue of fact shall be tried by jury. Whenever such proceedings involving identical [articles of wearing apparel or fabrics] products, fabrics, or related materials are pending in two or more jurisdictions, they may be consolidated for trial by order of any such court upon application seasonably made by any party in interest upon notice to all other parties in interest. Any court granting an order of consolidation shall cause prompt notification thereof to be given to other courts having jurisdiction in the cases covered thereby and the clerks of such other courts shall transmit all pertinent records and papers to the court designated for the trial of such consolidated proceedings.

(c) In any such action the court upon application seasonably made before trial shall by order allow any party in interest, his attorney, or agent, to obtain a representative sample of the [article of wearing apparel or fabric] product, fabric, or related material seized.

(d) If such [articles of wearing apparel or fabrics] products, fabrics, or related materials are condemned by the court they shall be disposed of by destruction, by delivery to the owner, or claimant thereof upon payment of court costs and fees and storage and other proper expenses and upon execution of good and sufficient bond to the effect that such [articles of wearing apparel or fabrics] products, fabrics, or related materials will not be disposed of [for wearing apparel purposes] until properly and adequately treated or processed so as to render them lawful for introduction into commerce, or by sale upon execution of good and sufficient bond to the effect that such [articles of wearing apparel or fabrics] products, fabrics or related materials will not be disposed of [for wearing apparel purposes] until properly and adequately treated or processed so as to render them lawful for introduction into commerce. If such [products] products, fabrics, or related materials are disposed of by sale the proceeds, less costs and charges, shall be paid into the Treasury of the United States.

PENALTIES

SEC. 7. Any person who willfully violates section 3, 5(e), or 8(b) of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not more than \$5,000 or be imprisoned not more than one year or both in the discretion of the court: PROVIDED, That nothing herein shall limit other provisions of this Act.

GUARANTY

SEC. 8. (a) No person shall be subject to prosecution under section 7 of this Act for a violation of section 3 of this Act if such person (1) establishes a guaranty received in good faith signed by and containing the name and address of the person by whom the [wearing apparel or fabric] product, fabric, or related material guaranteed was manufactured or from whom it was received, to the effect that reasonable and representative tests made [under the procedures provided in section 4 of this Act show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not, under the provisions of section 4 of this Act, so highly flammable as to be dangerous when worn by individuals,] in accordance with standards issued or amended under the provisions of section 4 of this Act show that the fabric or related material covered by the guaranty, or used in the product covered by the guaranty, conforms with applicable flammability standards issued or amended under the provisions of section 4 of this Act, and (2) has not, by further processing, affected the flammability of the [fabric or wearing apparel] fabric, related material, or product covered by the guaranty which he received. Such guaranty shall be either (1) a separate guaranty specifically designating the [wearing apparel or fabric] product, fabric, or related material guaranteed, in which case it may be on the invoice or other paper relating to such [wearing apparel or fabric] product, fabric, or related material; or (2) a continuing guaranty given by seller to buyer applicable to any product, fabric, or related material sold or to be sold to buyer by seller in a form as the Commission, by rules and regulations may prescribe; or (3) a continuing guaranty filed with the Commission applicable to any [wearing apparel or fabric] product, fabric, or related material handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

(b) It shall be unlawful for any person to furnish, with respect to any [wearing apparel or fabric,] product, fabric, or related material, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person by whom the [wearing apparel or fabric] product, fabric, or related material guaranteed was manufactured or from whom it was received) with reason to believe the [wearing apparel or fabric] product, fabric, or related material falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

SHIPMENTS FROM FOREIGN COUNTRIES

SEC. 9. Any person who has exported or who has attempted to export from any foreign country into the United States any wearing apparel or fabric which, under the provisions of section 4, is so highly flammable as to be dangerous when worn by individuals may thenceforth be prohibited by the Commission from participating in the exportation from any foreign country into the United States of any wearing apparel or fabric except upon filing bond with the Secretary of the Treasury in a sum double the value of said products and any duty thereon, conditioned upon compliance with the provisions of this Act.]

Sec. 9. An imported product, fabric, or related material to which flammability standards under this Act are applicable shall not be delivered from customs custody except as provided in section 499 of the Tariff Act of 1930, as amended. In the event an imported product, fabric, or related material is delivered from customs custody under bond, as provided in section 499 of the Tariff Act of 1930, as amended, and fails to conform with an applicable flammability standard in effect on the date of entry of such merchandise, the Secretary of the Treasury shall demand redelivery and in the absence thereof shall assert a claim for liquidated damages for breach of a condition of the bond arising out of such failure to conform or redeliver in accordance with regulations prescribed by the Secretary of the Treasury or his delegate. When asserting a claim for liquidated damages against an importer for failure to redeliver such nonconforming goods, the liquidated damages shall be not less than 10 per centum of the value of the nonconforming merchandise if, within five years prior thereto, the importer has previously been assessed liquidated damages for failure to redeliver nonconforming goods in response to a demand from the Secretary of the Treasury as set forth above.

INTERPRETATION AND SEPARABILITY

SEC. 10. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other law. If any provision of this Act or the application thereof to any person or circumstances is held invalid the remainder of the Act and the application of such provisions to any other person or circumstances shall not be affected thereby.

EXCLUSIONS

SEC. 11. The provisions of this Act shall not apply (a) to any common carrier, contract carrier, or freight forwarder *in transporting* [with respect to an article of wearing apparel or fabric] a product, fabric, or related material shipped or delivered for shipment into commerce in the ordinary course of business; or (b) to any converter, processor, or finisher in performing a contract or commission service for the account of a person subject to the provisions of this Act: PROVIDED, That said converter, processor, or finisher does not cause any [article of wearing apparel or fabric] product, fabric, or related material to become subject to this Act contrary to the terms of the contract or commission service; or (c) to any [article of wearing apparel or fabric] product, fabric, or related material shipped or delivered for shipment into commerce for the purpose of finishing or processing [to render such article or fabric not so highly flammable, under]

the provisions of section 4 of this Act, as to be dangerous when worn by individuals [such product, fabric, or related material so that it conforms with applicable flammability standards issued or amended under the provisions of section 4 of this Act.]

EFFECTIVE DATE

SEC. 12. This Act shall take effect one year after the date of its passage.

AUTHORIZATION OF NECESSARY APPROPRIATIONS

SEC. 13. There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

INVESTIGATIONS

SEC. 14. (a) The Secretary of Health, Education, and Welfare in cooperation with the Secretary of Commerce shall annually conduct a continuing study and investigation of the deaths, injuries, and economic losses resulting from accidental burning of products, fabrics, or related materials. The Secretary of Health, Education, and Welfare shall submit annually a report to the President and to the Congress containing the results of the study and investigation.

(b) In cooperation with appropriate public and private agencies, the Secretary of Commerce is authorized to—

- (1) conduct research into the flammability of products, fabrics, and materials;
- (2) conduct feasibility studies on reduction of flammability of products, fabrics, and materials;
- (3) develop flammability test methods and testing devices; and
- (4) offer appropriate training in the use of flammability test methods and testing devices.

The Secretary shall annually report the results of these activities to the Congress.

EXPORTS

SEC. 15. This Act shall not be applicable to any fabric, related material, or product intended solely for export and so labeled or tagged.

PREEMPTION

SEC. 16. This Act is intended to supersede any law of any State or political subdivision thereof inconsistent with its provisions.

NATIONAL ADVISORY COMMITTEE FOR THE FLAMMABLE FABRICS ACT

SEC. 17. (a) The Secretary of Commerce shall appoint a National Advisory Committee for the Flammable Fabrics Act, composed of not less than nine members, fairly representative of manufacturers, distributors, and the consuming public. Each member appointed by the Secretary shall hold office for not more than two years, except that any member may be reappointed.

(b) Members of the Committee who are not officers or employees of the United States shall, while attending meetings or conferences of such Com-

mittee or otherwise engaged in the business of such Committee, be entitled to receive compensation at a rate fixed by the Secretary, but not exceeding \$100 per diem, including traveltime, and while away from their homes or regular places of business they may be allowed travel expenses, including per diem in lieu of subsistence, as authorized in section 5703 of title 5 of the United States Code for persons in the Government service employed intermittently. Payments under this section shall not render members of the Committee employees or officials of the United States for any purpose.

(c) The Secretary shall consult with the National Advisory Committee before prescribing flammability standards or other regulations established under this Act.

SEC. 18. Notwithstanding the provisions of this Act, the standards of flammability in effect under the provisions of the Flammable Fabrics Act, as amended, on the day preceding the date of enactment of this Act, shall continue in effect for the articles of wearing apparel to which they are applicable until superseded or modified by the Secretary of Commerce pursuant to the authority conferred by the amendments made by this Act.

AGENCY COMMENTS

The following comments were received from interested agencies:

EXECUTIVE OFFICE OF THE PRESIDENT,
PRESIDENT'S COMMITTEE ON CONSUMER INTERESTS,
Washington, D.C., April 20, 1967.

Hon. WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: Thank you for sending us a copy of S. 1003, amendment to the Flammable Fabrics Act, for comment.

The purpose of S. 1003 is to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics.

Amendment (1) deletes the exceptions of hats, gloves, and footwear which were included in the original act. This amendment is realistic as these commodities are often made with flammable materials.

Amendment (2) deletes paragraph (f) of the original act. The deletion makes for a more readable act as well as being consistent with amendment (1).

Amendment (3) merely makes a redesignation of paragraphs (f), (g), and (h) as paragraphs (f), (i), and (j).

Amendment (4) adds a new paragraph to include "interior furnishings" as regulated under the act. Under the new amendment the term "interior furnishings" will mean any type of furnishings made in whole or in part from flammable fabrics used in homes, offices, and places of assembly. Many baby blankets, children's undergarments, and household draperies contain flammable materials. The implementation of this amendment will save lives, property, and suffering by victims of fires caused by flammable fabrics.

Amendment (5) brings a broader and more definitive language of the materials and fabrics covered under the act.

Amendment (6) adds paragraph (g) to further refine the kinds of materials and fabrics covered under the act.

Amendment (7) adds paragraph (h) which further adds to the scope of the products and material covered under the act.

Section 2: Section 3 "Prohibited Transactions" of the act was amended to be consistent with the first six amendments.

Section 3: Section 4 "Standards of Flammability" was amended to strengthen the section to require the Secretary of Commerce to publish in the Federal Register flammability standards (including conditions and manner of testing). It provides for a mechanism through which such standards of flammability may be changed and amended as needed or for cause.

The "Standard of Flammability" section was rewritten to include fabrics and materials previously excluded under the act. We believe these changes will strengthen the bill.

Under section 4(a), subsection (c) of section 5 was amended to prescribe rules and maintenance of records of fabrics, related materials,

and products so that the act can be properly administered. This is a strong, but reasonable, section designed to bring order to the movement of fabrics and products so they can be traced in the event they are found to be unsafe.

A new section 14 (a) and (b) "Investigations," was added. This section directs the Secretary of HEW and Commerce to annually conduct a study and investigation of the number of injuries and economic loss resulting from accidental burning of products, fabrics, and related materials. Such a study will give a new insight as well as provide a basis for continued surveillance of this vital problem.

The amendments to the Flammable Fabrics Act are sound and needed additions. They place reasonable restraints on producers and handlers of such products, and establish a definitive approach to standards of flammability as well as testing procedures.

The President, in his consumer message last February, urged no delay in amending the Flammable Fabrics Act of 1953. He said:

The Act does not cover many articles of clothing which can be consumed by fire almost instantaneously. It is narrowly restricted to certain wearing apparel. It does not extend to such everyday items as baby blankets, drapes, carpets and upholstery fabrics.

We have been advised by the Bureau of the Budget that there would be no objection to the presentation of this report and that enactment of the legislation would be in accord with the President's program.

Sincerely,

(Miss) BETTY FURNESS,
*Special Assistant to the President for
Consumer Affairs-Designate.*

THE GENERAL COUNSEL OF THE TREASURY,
Washington, D.C., May 3, 1967.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: Reference is made to your request for the views of this Department on S. 1003, to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics.

The Flammable Fabrics Act prohibits the introduction or movement in interstate commerce of articles of wearing apparel and certain fabrics which fail to pass specified tests of flammability. The proposed legislation is designed to close gaps which exist in the present law. It would, among other things, authorize improvement in present standards for wearing apparel, extend coverage of the act to include interior furnishings such as bedding, upholstery, and other flammable materials, and authorize administrative issuance of new standards of flammability.

Among the transactions which will be prohibited by the bill is the importation of any product which fails to conform to a standard of flammability issued by the Secretary of Commerce. After such standards are issued, the Bureau of Customs of the Treasury Department

will cooperate with the Federal Trade Commission by advising that agency of questionable importations which do not appear to meet the prescribed standards of flammability and will furnish samples of such importations to the Federal Trade Commission for testing upon their request. The Bureau of Customs cooperates with the Federal Trade Commission in this manner under the present act with regard to wearing apparel.

Under section 9 of the bill, the Treasury Department may also be requested by the Federal Trade Commission to prohibit imports by any person who has imported or attempted to import any product, fabric, or related material which failed to conform to applicable standards of flammability, except upon the filing of a bond in a sum double the value of the imported goods.

The Department favors enactment and anticipates no unusual administrative difficulties in carrying out its functions under this bill. However, the broader coverage will result in a greater workload upon customs officers generally.

The Department has been advised by the Bureau of the Budget that the proposed legislation would be in accord with the President's program.

Sincerely yours,

FRED B. SMITH,
General Counsel.

DEPARTMENT OF THE ARMY,
Washington, D.C., May 19, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce, U.S. Senate.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense on S. 1003, 90th Congress, a bill to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics. The Department of the Army has been assigned responsibility for expressing the views of the Department of Defense on this bill.

The title of the proposed bill states its purpose.

Among other things, the bill would increase the coverage of the Flammable Fabrics Act to include all individual wearing apparel and fabrics or related material sold or intended for use in homes, offices, and places of assembly and authorize the Secretary of Commerce to establish flammability standards for materials covered by the act. The bill will enable the Secretary of Commerce to exercise more control over a wider range of injurious flammable fabrics and related materials and to be more responsive to consumer needs for protection from such products. For the foregoing reasons, the Department of the Army on behalf of the Department of Defense supports the enactment of the proposed bill.

The fiscal effects of this legislation are not known to the Department of Defense.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

The Bureau of the Budget advises that this report is in accordance with the administration's program.

Sincerely,

STANLEY R. RESOR,
Secretary of the Army.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
Washington, D.C., April 13, 1967.

Hon. WARREN G. MAGNUSON,
*Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C. 20510*

DEAR MR. CHAIRMAN: This letter is in response to your request of February 20, 1967, for a report on S. 1003, a bill to amend the Flammable Fabrics Act to increase protection afforded consumers against injurious flammable fabrics.

The bill would make the act applicable to all types of wearing apparel and to a broader range of constituent materials thereof, including paper and plastics, and authorize the Secretary of Commerce to establish revised standards of flammability therefor in lieu of the standards frozen into the present act; and would authorize the Secretary to issue (and from time to time revise) standards of flammability for, and thus extend the coverage of the act to, interior furnishings—such as draperies, rugs, upholstery, and bedding—if he determined that standards are needed for those materials. Such standards would be enforced by the Federal Trade Commission, as under the present Flammable Fabrics Act.

The bill would also, among other things, give the Department of Commerce authority to conduct research on the flammability of furnishings, fabrics, and materials and would require the Secretary of Health, Education, and Welfare, in cooperation with the Secretary of Commerce, to conduct an annual investigation of deaths, injuries, and economic losses resulting from accidental burnings of such products, fabrics, or related materials. The Secretary of Health, Education, and Welfare would also be directed to submit an annual report to the President and Congress containing the results of the study and identifying such standards as appear to require revision.

In his message of February 16, 1967, the President recommended legislation to broaden and strengthen the Flammable Fabrics Act to close gaps in the act pointed out in the message. S. 1003 is designed to carry out this recommendation, and we recommend enactment of the bill. (In view of the testimony on behalf of this Department scheduled for the forthcoming hearings on the bill, we are not burdening this report with a discussion of the problems to which the bill is addressed.)

We are advised by the Bureau of the Budget that enactment of this bill would be in accord with the program of the President.

Sincerely,

WILBUR J. COHEN,
Under Secretary.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., April 12, 1967.

HON. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1003, a bill to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics.

The bill would implement the recommendations contained in the President's consumer message by strengthening the standards to be prescribed under the act and extending its application to certain fabrics and products not now covered (President's message "American Consumer Protection," February 16, 1967 (H. Doc. 57, 90th Cong.)).

The Department of Justice favors the objectives of this legislation but defers to the agencies primarily concerned as to the enactment of this bill.

The Bureau of the Budget has advised that enactment of this legislation would be in accord with the program of the President.

Sincerely,

RAMSEY CLARK,
Attorney General.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., March 13, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter of February 20, 1967, invites our comments on S. 1003, entitled "A bill to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics."

While we are in sympathy with the bill's objective, we have no special information or comment to offer for your consideration in connection with the proposed legislation.

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

NATIONAL SCIENCE FOUNDATION,
 OFFICE OF THE DIRECTOR,
Washington, D.C., March 15, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your letter of February 23, 1967, requesting the comments of the National Science Foundation on S. 1003, to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics.

We do not feel that the subject matter of this bill is sufficiently related to the mission or activities of the Foundation to make comments from us meaningful or appropriate.

The Bureau of the Budget has advised us that it has no objection to the submission of this report from the standpoint of the administration's program.

Sincerely yours,

LELAND J. HAWORTH,
Director.

DEPARTMENT OF AGRICULTURE,
Washington, D.C., April 4, 1967.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: This is in reply to your request of February 23, 1967, for a report on S. 1003, a bill to amend the Flammable Fabrics Act to increase the protection afforded consumers against injurious flammable fabrics.

The principal purpose of this bill is to extend the scope of the present Flammable Fabrics Act to include not only articles of wearing apparel but also articles used for interior furnishing, such as drapes, bedding, rugs, and upholstery fabric, and to establish standards of flammability that will adequately protect the public against unreasonable risks of the occurrence of fire leading to death, injury, or significant property damage.

This Department recommends passage of the bill.

The Flammable Fabrics Act has done much to prevent the marketing of extremely flammable clothing and has thus contributed to people's safety. We believe these provisions will strengthen the present act and make it more valuable to the general public.

The Bureau of the Budget advises that enactment of this proposed legislation would be in accord with the President's program.

Sincerely yours,

ORVILLE L. FREEMAN,
Secretary.

**PROHIBITING THE INTRODUCTION OR MOVEMENT IN
INTERSTATE COMMERCE OF FLAMMABLE FABRICS**

MAY 14, 1953.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WOLVERTON, from the Committee on Interstate and Foreign Commerce, submitted the following

R E P O R T

[To accompany H. R. 5069]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 5069) to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF LEGISLATION

The purpose of the bill here being reported, which has this committee's unanimous approval, is to protect the public from the danger surrounding the use in wearing apparel of highly flammable textiles of the types which have caused either bodily injury or death to numerous individuals. The bill is limited in scope to wearing apparel and fabrics which are intended or sold for use in wearing apparel. It will outlaw, for example, the introduction, movement, or sale in interstate commerce of highly flammable children's cowboy playsuits, and the so-called torch sweaters or jackets which have caused serious injuries and death to a number of innocent and unsuspecting individuals in recent years.

HEARINGS

On April 16, 28, and 29, 1953, this committee held public hearings on five similar bills, H. R. 389, by Mr. Canfield of New Jersey; H. R. 2768, by Mr. Wolverton of New Jersey; H. R. 3851, by Mr. Canfield of New Jersey; H. R. 4159, by Mr. Johnson of California; and H. R. 4500 by Mr. Williams of Mississippi. The principal objective of all

these bills is to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals. H. R. 5069, the reported bill, was introduced by Mr. Wolverton, chairman of the committee, and at the direction of the committee, as a "clean" bill as a result of the committee hearings and after executive consideration of all the bills pending before the committee.

Every witness who testified before the committee, without exception, representing virtually all segments of the textile industries and trades, urged prompt and effective Federal legislation to protect the public from the dangers of highly flammable wearing apparel and fabrics used in wearing apparel, and supported these bills in principle. Moreover, the committee was urgently requested to take prompt action on this legislation. It was pointed out that if this legislation is not enacted, a variety of State and local regulations lacking in uniformity might very well ensue. It seems obvious that uniformity of regulation in this matter is necessary.

Testimony in support of legislation on this subject was received from the Federal Trade Commission, the National Cotton Council of America, the National Retail Dry Goods Association, the Tufted Textile Manufacturers Association, the Society of the Plastics Industry, the Rayon and Acetate Fiber Producers, and others.

NEED FOR THE LEGISLATION

Actual experiences in the past show that the risks and possibilities of bodily harm suffered by consumers in the use of highly flammable wearing apparel are severe and most dangerous. Still fresh in our minds is the great wave of burnings and even deaths which children have suffered when wearing highly flammable cowboy playsuits. More recently, there have been a number of cases involving the so-called explosive sweaters which were sold to the public by itinerant vendors.

The Federal Trade Commission cited a number of these incidents. One man lost his sweater in flames while sitting in a courtroom. In another instance a man driving his automobile lit a cigarette which ignited his sweater. He succeeded in pulling it over his head but suffered second- and third-degree burns on his face, neck, and hands. His car jumped the curb and collided with a telephone pole. Instances of severe burns suffered by individuals were reported from many parts of the country. A General Motors employee reported that he lit a cigarette while wearing his new Christmas sweater and that four fellow employees saved his life by beating out the flame. He said:

It was a terrifying thing. It was just as if you threw a match into a rag soaked with gasoline. There was that same "poof" sound, and all of a sudden flames were all over me.

Other examples of the danger inherent in apparently innocent but nevertheless highly flammable wearing apparel were given by Dr. Frederic Bonnet, adviser to the president of the American Viscose Corp., when he testified in 1947 before this committee on similar proposed legislation. Here is his description of a few of these tragedies and near tragedies:

Martha M. Gross, Kansas City, Mo., had a sweater patterned after angora, having long, fuzzy nap, purchased in Baltimore. The head of a match flew off

against the sweater, igniting it. Her brother and sister came to her rescue and both were burned. She was very ill and suffered disfiguring scars and her hands were injured so that she could no longer follow her profession, which was that of a stenographer and secretary.

I would like to add here that she sent a very pathetic letter to the National Bureau of Standards, and to other departments, asking whether something could not be done to prevent such accidents happening to others. She said it was all over with her case, but certainly life was still dear in America.

Then, we have the case of Doris E. Diffenbach who was injured when a cotton chenille dressing gown took fire.

Georgia Stevens, 18-year-old coed, was burned to death at a sorority initiation rite last spring at the University of Texas. It was a candlelight initiation and her gown brushed against a lighted candle. She died the next morning.

Virginia Black wore a white tulle dress at a coming-out dance at the St. Regis Hotel. The dress caught fire and she was severely burned. She is still in the hospital, I understand.

Angelica and Harry Murphy are bringing suit for \$125,000 because of some apron material, a coated fabric so highly flammable that when it came in proximity of a heated stove it took fire and severely burned her and her husband.

Mary Lee Cummings, aged 5, Whittier, Calif., was wearing a plastic raincape and backed into a radiant heater which ignited the plastic, causing second- and third-degree burns from which she died. That is the one that Mr. Dorn referred to in his testimony, and was reported by the California State fire marshal.

I need hardly refer you the twenty-odd boys 3 to 8 years of age who were burned, maimed, and 6 of whom died, as the result of burns sustained when their cowboy suits took fire.

The National Fire Protective Association records the following:

In Oakland, Calif., a girl died from burns received when her costume caught fire at a lodge entertainment.

In Magnolia, Ark., a Negro woman died from burns received when a grass dress caught fire from a can heater in a dressing room of a traveling minstrel show.

In Omaha, Nebr., a child dressed in an Indian costume which caught fire from the lighted jack-o'-lantern she was carrying. She suffered fatal burns.

I might add that children go to communion or confirmation carrying lighted candles, and have been injured.

In New Orleans on February 12, 1947, a bride, Mrs. Jess Rockenbaugh, was wearing a bathrobe which caught on fire. She was saved by her husband who cut the robe belt and pulled off the robe, but not before she suffered third-degree burns, and she is still in the hospital.

In Old Greenwich, Conn., a man's pajamas caught fire from the kitchen range. He suffered fatal burns. Those were cotton nap pajamas.

In Portland, Oreg., a man died of burns received when his trouser leg became ignited by a match. I do not know what he was wearing.

In Washington, D. C., a child's costume became ignited from a candle in a jack-o'-lantern. She was out in the yard when the accident occurred. She suffered fatal burns.

In Indianapolis, Ind., a woman pulled a light plug from a receptacle when a short circuit occurred, throwing sparks onto her dress. She suffered fatal burns.

In Yonkers, N. Y., a 4-year-old child was turned into a blazing torch as her Halloween costume was ignited by a jack-o'-lantern. She died in a hospital.

In Detroit, Mich., a man died of burns when his bathrobe caught fire when he was tending the furnace in his home.

In Denver, Colo., a woman suffered fatal burns when her clothing ignited while standing in front of a lighted fireplace.

I might mention a few others mentioned this morning. Namely: Mrs. Booth Tarkington was wearing some hair combs and was drying her hair in an ordinary hair dryer when she suffered severe burns owing to the ignition, spontaneous ignition, of those combs.

There was also a case of a woman sitting in front of a chafing dish wearing nitrocellulose buttons. These buttons practically exploded in her face and set her afire. She died of her injuries. This is given in Coronet under the heading of an article headed "Fire Trap."

I need not go on, I think, with the recitation of these cases. They extend over many years. They have grown more numerous within recent years

In January 1952, a rash of burnings took place, involving highly flammable sweaters. Some of these cases are summarized below:

SOME NEWSPAPER CLIPPINGS RECEIVED BY THE FEDERAL TRADE COMMISSION RELATING EXPERIENCES INDIVIDUALS HAVE HAD WITH DANGEROUSLY INFLAMMABLE BRUSHED RAYON WEARING APPAREL

The Kansas City Times of January 9, 1952, reported under Los Angeles dateline of January 8 that the fire captain of Los Angeles had received reports of at least a dozen cases in which brushed fabric sweaters had caught fire and at least eight persons injured by burns.

The Kansas City Star of January 10, 1952, reported that Paul Blake of Kansas City ignited a cigarette with his lighter and when he placed the lighter into the sweater pocket, the sweater burst into flames. Four fellow employees saved him from burns by beating the flames out after half the sweater had been consumed.

The New York Times of January 12, 1952, reported that Robert Flavin of Long Branch, N. J., was burned on both hands the day previous when a sweater he was wearing flared up as he struck a match to light a cigarette.

The New York Sunday News of January 13, 1952, reported that Mrs. Mary Sheffield of Newark, N. J., was burned about both hands when the sweater she was wearing suddenly burst into flames as she turned on her gas stove to prepare a meal. The same issue newspaper reported that at least 20 persons throughout the country had been injured by flaming sweaters.

The Norristown (Pa.) Times of January 14, 1952, reported that Edward C. Martin of Schwenkville lighted a cigarette with a match and the sweater he was wearing went up "like a Roman candle." A friend extinguished the fire by throwing water on the sweater but not before Martin's neck was scorched.

The Washington Post of January 16, 1952, reported that J. Patrick Staubs of Silver Spring, Md., escaped serious injury the previous Sunday when the sweater he was wearing on a golf course caught fire as he lighted a cigarette.

The Federal Trade Commission undertook in the problem of the flaming sweaters to exercise, to the fullest, such powers as it presently has in an effort to protect the public, but as the Commission's witness pointed out during the course of the hearings, the present law is inadequate to cope fully with the problem. Legislation is needed to make it possible effectively to forestall the introduction into the market of these highly flammable products. After the dangerous articles leave the factory and get into one or more of the many channels of trade, it becomes impossible to track them down in time to prevent persons from being badly burned and even suffering death, as in the case of the playsuits which were worn by children when they took fire and resulted in the death of many of them. Legislation in which the corrective power is of a preventive nature is required to be effective in reaching the evil, as well as power to enjoin and stop continued distribution of the dangerous articles.

Your committee is advised by the Federal Trade Commission that the authority conferred by existing statutes is not adequate to forestall the danger to the public in this situation, or even to provide a temporary stop order during the time that is required for litigation to follow its necessary course to final application of the corrective power. The Commission further advises that the right of applying a temporary restraining order or injunction, or of preventive inspections, is presently not available to it. Furthermore, there is now no direct statutory authority to keep dangerously flammable garments out of the channels of interstate commerce.

Charles W. Dorn, director of the research laboratory of the J. C. Penney & Co., and chairman of the technical committee of the National Retail Dry Goods Association, appearing before the committee in support of this legislation, gave still another cogent reason for its enactment. He testified that—

The NRDGA has always believed that the United States grew strong because of the sovereignty of the individual States and has stanchly opposed extension of Federal jurisdiction over matters best handled at the State level. In this instance, however, we firmly believe that the Congress must lead the way. Recently several States and a number of city and other local bodies have considered legislation on the subject of dangerously flammable apparel. Only one State, California, has adopted such legislation. The confusion which is bound to result if the several States were to legislate individually on this subject is obvious, for in the absence of a national standard, each State and local community would provide for different guides or measurements. I can readily testify that this is not an idle conclusion, for in the past months the possibility of a Federal enactment has been the sole basis for postponing very unsatisfactory legislation in several States.

Failure by this Congress to act undoubtedly will cause a flood of haphazard local legislation which will not only bring on an impossible situation in the textile industries, but, more important, will deny to many consumers the responsible protection contained in the proposed bills.

The manufacturers of your respective States would have great difficulty in producing garments or fabrics which would comply with the different requirements of 2 or 20 different State acts, to say nothing of different local ordinances. And those residents of States which failed to act would have no protection at all. For these reasons I urge the Congress to legislate on this subject and thus insure uniformity and protection for all.

HISTORY OF LEGISLATION

Bills to prohibit the transportation in interstate commerce of highly flammable fabrics and wearing apparel have been introduced in the House beginning with the 79th Congress, 1st session (1945). In the 80th Congress, this committee held extensive hearings on three flammable fabric bills, namely, H. R. 505, by Mr. Canfield of New Jersey; H. R. 601, by Mr. Johnson of California; and H. R. 1111, by Mr. Arnold of Missouri. Similar bills were introduced during the 81st and 82d Congresses. In the 82d Congress, the Senate passed unanimously on July 3, 1952, S. 2918, a bill similar in many respects to the reported bill, H. R. 5069. S. 2918 was reported by your committee on July 4, 1952. The House took no action on that bill prior to the adjournment of the Congress on July 7, 1952.

STANDARDS OF FLAMMABILITY

The major problem in formulating legislation to control the use of dangerously flammable textiles is to discriminate between the conventional fabrics that present moderate and generally recognized hazards and the special types of fabrics which present unusual hazards and are highly dangerous.

The rate of burning of a garment or other textile product depends upon the kind of fiber, the finishing materials present, the structure of the yarn and fabric, and such circumstances as the relative humidity. In general, wool textiles ignite and burn with difficulty while cotton and rayon ignite and burn more readily. The major hazards arise from certain cotton or rayon fabrics having fuzzy or furlike surfaces which flash and burn with exceeding rapidity. Most synthetic textiles melt when heated and the molten material is capable of producing serious burns on coming in contact with the skin.

Section 4 of the bill prescribes the standards of flammability. Commercial Standard 191-53, promulgated by the Secretary of Commerce effective January 30, 1953, prescribes the standard for flammability of clothing textiles and Commercial Standard 192-53,

promulgated by the Secretary of Commerce effective May 22, 1953, prescribes the standard of flammability for vinyl plastic film.

Commercial Standard 191-53 is a voluntary standard developed through the combined effort of a number of scientific and technical groups and represents the combined opinion of an industry committee speaking for the cotton and rayon producers, and fabric manufacturers, finishers, converters, wholesalers, retailers, and consumers coordinated by the American Association of Textile Chemists and Colorists and the National Retail Dry Goods Association. The National Bureau of Standards participated in this work by active service on technical committees, by the conduct of a wide variety of investigational and testing work, and by aiding in the reconciliation of different points of view.

The flammability test provided in the Commercial Standard 191-53 makes use of strips of fabric 2 by 6 inches in dimensions. The test consists of measuring the burning time in seconds when the test piece is mounted in a specially designed apparatus and a flame is applied in a prescribed manner. Fabrics with a flame spread of more than 7 seconds are classed as having normal flammability. Those with a flame spread of less than 4 seconds are classed as rapid and intense burning, while those burning in 4 to 7 seconds are rated as having intermediate flammability. This bill is directed to those fabrics which are classed as rapid and intense burning fabrics.

Commercial Standard 191-53 states that this standard shall not apply to hats, gloves, and footwear. Notwithstanding this specific exception made in the standard, it is the intention of your committee that this standard shall be applicable to the hats, gloves, and footwear defined in section 2 (d) of this act. Commercial Standard 192-53 makes no exception to hats, gloves, and footwear.

Commercial Standard 192-53 is the industry-approved standard with respect to vinyl plastic film. Such film is used in the manufacture of various articles of wearing apparel such as raincoats, capes, hoods, pants, and aprons. The flammability test is prescribed in paragraph 3.11 of this standard.

Section 4 provides further that if at any time the Secretary of Commerce finds that the commercial standards referred to above are inadequate for the protection of the public interest, he shall submit to the Congress a report setting forth his findings, together with such proposals for legislation as he deems appropriate.

The committee intends that the Secretary of Commerce shall make continuous studies of the suitability and effectiveness of these and related test methods in providing adequate protection to the public from the hazards of flammability.

ADMINISTRATION AND ENFORCEMENT

H. R. 5069 follows the pattern of legislation established by the Wool Products Labeling Act of 1939, and the Fur Products Labeling Act, enacted in the 82d Congress. If enacted into law, H. R. 5069 will be administered and enforced by the Federal Trade Commission. The act will take effect 1 year after the date of its enactment.

SECTION-BY-SECTION EXPLANATION OF THE BILL

Section 1 provides a short title for the act: "Flammable Fabrics Act."

Section 2 contains definitions of various terms used in the bill. "Article of wearing apparel" is defined as any costume or article of clothing worn or intended to be worn by individuals. Hats, gloves, and footwear are excepted, provided that such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals; provided also that such gloves are not more than 14 inches in length and are not affixed to or do not form an integral part of another garment; and provided that the footwear does not consist of hosiery in whole or in part and is not affixed to or does not form an integral part of another garment.

The term "fabric" is limited to material that is intended or sold for use in wearing apparel, with an exception for interlining fabrics when intended or sold for use in wearing apparel. "Interlining" means any fabric which is intended for incorporation into an article of wearing apparel as a layer between an outer shell and an inner lining.

Section 3 declares that the manufacture for sale, the sale, or the offering for sale in commerce, or the importation into the United States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any article of wearing apparel, or fabric, or wearing apparel made of fabric which is so highly flammable as to be dangerous when worn by individuals shall be unlawful, and an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

Section 4 is the "Standard of flammability" section. It provides that any fabric or article of wearing apparel shall be deemed so "highly flammable" within the meaning of section 3 as to be dangerous when worn by individuals if such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the commercial standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53," or in the commercial standard promulgated by the Secretary of Commerce effective May 22, 1953, and identified as "General Purpose Vinyl Plastic Film, Commercial Standard 192-53."

If these standards are, at any time, found by the Secretary of Commerce to be inadequate for the protection of the public interest, he must submit a report to the Congress setting forth his findings, together with such proposals for legislation as he deems appropriate.

Section 5 is the administration and enforcement section. It states that sections 3, 5, 6, and 8 (b) shall be enforced by the Federal Trade Commission under rules, regulations, and procedures provided for in the Federal Trade Commission Act. It also authorizes the Commission to make inspections, tests, analyses, and examinations of any article of wearing apparel or fabric which it has reason to believe falls within the prohibitions of the act.

Section 6 provides for injunction and condemnation proceedings where the Commission deems such proceedings are warranted.

Section 7 is the criminal penalty section applicable to willful violations of section 3 of 8 (b) of the act.

Section 8 is the guaranty section. Subsection (a) provides that no person shall be prosecuted under section 7 for a violation of section 3 if such person establishes a guaranty received in good faith from the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received to the effect that reasonable and representative tests were made under the procedures provided in section 4, and that such tests show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not so highly flammable as to be dangerous when worn by individuals. This subsection specifies what provisions the guaranty shall contain. Provision is made for a separate guaranty or a continuing guaranty. The furnishing of a guaranty is optional. Subsection (b) makes unlawful the furnishing of a false guaranty, and declares that any person who violates the provisions of this subsection is guilty of an unfair method of competition and an unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act.

Section 9 relates to shipments from foreign countries. It authorizes penalties in the case of those persons who export or attempt to export from any foreign country into the United States any wearing apparel or fabric which is so highly flammable as to be dangerous when worn by individuals.

Section 10 contains the usual separability clause and provides that the provisions of this act shall be held to be in addition to, and not in substitution of, the provisions of any other law.

Section 11 excludes from the provisions of the act common and contract carriers and freight forwarders, certain converters, processors, or finishers, as well as any article of wearing apparel or fabric which is shipped or delivered for shipment into commerce for the purpose of finishing or processing to render such article or fabric not so highly flammable as to be dangerous when worn by individuals.

Section 12 provides that the act shall take effect 1 year after its enactment.

Section 13 authorizes the necessary appropriations to carry out the purposes of the act.

CONCLUSION

Your committee believes that the inadequacy of present statutory powers to cope effectively with the urgent problem of protecting innocent and unsuspecting individuals from bodily injury and even death resulting from the use of wearing apparel, and fabrics used in wearing apparel, which are highly flammable makes the enactment of this legislation imperative.

REPORTS FROM EXECUTIVE DEPARTMENTS IN SUPPORT OF LEGISLATION

Reports on H. R. 389, H. R. 2768, H. R. 3851, H. R. 4159, and H. R. 4500, upon which your committee held public hearings, were received from the Federal Trade Commission, the Department of Commerce, the Department of Agriculture, and the Board of Commissioners for the District of Columbia. These reports follow.

FEDERAL TRADE COMMISSION,
March 19, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.

MY DEAR MR. WOLVERTON: This is in response to your recent communication requesting report and comment upon H. R. 2768, entitled "A bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes" (83d Cong., 1st sess.).

The problem to which the proposed legislation is directed has been the subject of much attention by the Commission. In our view the need for more adequate protection of the public against the hazards and risks arising from the marketing of textile merchandise of highly flammable character is a pressing one.

The text of the bill, H. R. 2768, appears to us to be in excellent shape with the exception of certain points which we believe merit careful consideration by the Congress. These points and our suggestions and comments in respect to them are presented as follows:

• SCOPE OF H. R. 2768

(1) It will be noted that the bill in its scope is limited to certain articles of wearing apparel and fabrics which are intended or sold for use in wearing apparel. Such things, therefore, as blankets for children and adults, bedspreads, laprobes, upholsteries, draperies, stuffed toys, rugs, and household textiles generally are not covered by the measure. Fabric merchandise used in the home can be highly flammable and involve much danger to the safety of individuals in their constant use in close contact with individuals in the family. They may be especially hazardous to small children and elderly persons who, it may be assumed, are not able to act with as much speed or agility for protecting themselves in the event of fire as are the normal, active, inbetween ages.

Exclusion of these textiles, therefore, presents a serious question as to whether the bill should be enlarged in its scope so as to be applicable to such household or family textiles when they are so highly flammable as to be seriously dangerous to individuals in their ordinary use in the home.

We feel that these additional items when made of dangerously flammable materials should not be excluded from the bill unless the committee prefers to have them treated in separate legislation. This might well be deemed by the committee to be a desirable course to follow in view of the apparent need of having at least partial coverage speedily enacted into law.

(2) With respect to the exception provided in section 2 (d) of "hats, gloves, and footwear," it is noted that such is limited by provisos. In previous consideration of legislation of this type we had suggested restrictions of the character set forth in these provisions. Unless restricted at least to the extent attempted by such provisos, the exemption of hats, gloves, and footwear, it appears, would in instances leave the public exposed to the dangers against which the bill is intended to afford protection.

Without the limiting provisions, such wearing apparel as hoods, baby bonnets, head scarves, and types of headwear which cover the neck, face, or shoulders, are likely to be excluded from the law, although when made of fibres which under the standards of the bill exhibit rapid and intense burning, they can present hazards of most serious consequence. For the same reason, the provisos likewise properly prevent an exception being accorded to gloves which are very long or are part of another garment, to hosiery, and to types of footwear that form part of another article of wearing apparel. In the event of their becoming ignited, these articles present difficulty in respect to quick removal from the person. Such factor is of considerable importance since avoidance of dangerous burns depends in large measure upon the ease and speed with which the garment can be taken off by the wearer.

While not wholly removing the exemption of hats, gloves, and footwear, we believe the provisos set forth in section 2 (d) are necessary to afford certain reasonable limitation of the character mentioned in the interest of protecting the consumer.

(3) Among further exemptions from the measure is that of "fiber filament or yarn" as provided in section 2 (e). Textiles within this exempt class are used extensively for hand knitting and making into garments in the home. The hand knitting of sweaters for children and grownups, and other use of yarns and filaments in connection with family-made garments or articles are not uncommon.

It appears that materials in this class, especially those of the rather loose or soft type, can be of highly flammable and hazardous character.

In the circumstances, it is our view that the exception of fiber filaments and yarns contained in section 2 (e) should be removed so that the measure will not exempt from its scope those filaments and yarns sold to ultimate consumers for home knitting or making into garments which in their normal and intended construction and use are so highly flammable as to be dangerous to individuals.

The ordinary yarns or filaments widely used in the home, and which are not of such highly flammable and dangerous character, would not be disturbed by removal of this exemption because the restrictions imposed by the bill are intended to apply only to the materials which exhibit such rapid and intense burning as to be dangerous when worn by individuals.

STANDARD OF FLAMMABILITY

(4) Section 4 of the bill specifies the Commercial Standard CS 191-53 as the required test for dividing between those fabrics and articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals, and those which are not. This commercial standard was developed, according to our understanding, by the industry under the procedures of the Department of Commerce and the National Bureau of Standards.

The efficacy of the entire legislation under the language of the bill would depend upon whether or not this standard is in fact adequate from the standpoint of affording due protection of the consuming public. It provides, for example, that if, after the fabric has been dry-cleaned and washed, 4 seconds or more are required to burn it a distance of 6 inches when placed at a 45° angle in a draftproof ventilated cabinet, that fabric shall not be considered under the ban of the test and consequently not under the control of this bill. It will be noted that the line of demarcation between the good and the bad, in respect to flammability, is so finely drawn that 1 second of burning determines whether or not the article is of a dangerous character.

Terms of the standard provide that the fabric shall be evaluated on the basis of its first having undergone dry-cleaning and washing. Dangerously flammable sweaters which gave rise to a rash of burnings in different parts of the country and against which the Commission has proceeded under the limited powers now available to it, involve cases which took place before the sweaters were washed or dry-cleaned. For the most part, consumers do not wash or dry-clean new garments until after they have been worn for a considerable period of time. Therefore, the hazards that should be guarded against not only are those which take place after washing and dry cleaning, but also the dangers and risks involved in wearing the garment before it has been dry-cleaned or washed. There may be a serious question in the circumstances as to whether the test procedure of the standard is realistically adjusted to conditions applicable to the consumer in his normal use of the garment.

We feel that the standard of flammability fixed should necessarily be one that is found to be adequate to afford that due protection of the consumer which it is the purpose of the legislation to achieve. While the commercial standard specified has been promulgated by the Department of Commerce, it is our understanding that this does not constitute a finding or ruling either by the National Bureau of Standards or by the Secretary of Commerce that in their opinion such standard is adequate from the standpoint of the public.

In respect to section 4 of the bill it is also noted that the Secretary of Commerce "is authorized and directed to establish test methods, procedures, and standards for determining the rapid and intense burning of wearing apparel and fabrics and to promulgate such test methods, procedures and standards by publication in the Federal Register." Further provision is made to the effect that he shall not promulgate any test method, procedure, or standard, for purposes of the bill, unless in his opinion such "are adequate for the protection of the public interest." As indicated above we regard the necessity of making this finding of adequacy in the public interest as highly important.

The working out of a proper test method involves technical skills and the operation of scientific apparatus, and we are of the opinion that the scientific and technical facilities available in the National Bureau of Standards in the Department of Commerce should be utilized for making the official finding and ruling of adequacy of whatever test method is to be sanctioned by law as determinative.

(5) In further reference to standards it is noted that H. R. 2768 carries subsection 2 (i), defining the term "commercial standard." This subsection in the definitions is unnecessary since the only reference to the term in the remainder of the bill is that found in section 4 wherein the standard referred to is adequately identified and described. We therefore recommend the elimination of subsection 2 (i).

OTHER COMMENT

(6) The first word of section 5 (d) (1), namely, the word "cease," should be changed to the word "cause" to correct a misprint. Likewise, the small letter "i" in the commercial standard number in line 22 on page 5 should be changed to the figure "1" to correct a misprint.

Immediately preceding section 10 it may be helpful to insert the title "Interpretation and Separability," since titles are applied to all other sections.

In section 8 (a) the clause in lines 5 and 6 reading "under the presently existing procedures for the establishment of commercial standards" should be deleted. This clause has evidently been inserted inadvertently. As explained above, it should not be used as a limitation upon the power of the Secretary of Commerce to promulgate test standards which he finds necessary in the public interest. Opportunity for hearing or conferences of all parties concerned in the test standards would still be available under the Administrative Procedure Act, and without the above-quoted clause suggested for deletion.

COMMISSION'S SUPPORT OF LEGISLATION

The problem of highly flammable textile merchandise reaching the market and being purchased by consumers who are innocent and unaware of their dangerous character has broken out in cycles and has led to a series of instances in which consumers have suffered severe burns and even death. The Commission under its authority to act in prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act has proceeded to the extent of its powers to protect the public in respect to such hazardous and dangerous merchandise. Numerous cases have been investigated and after hearings cease and desist orders were issued in due course against parties placing such fabrics or garments in the channels of interstate commerce made in such way as to be highly flammable and dangerous.

The Commission does not have authority under present law to forestall the introduction of these products into the channels of trade but can only proceed after the material has gotten into the market. Adequate protection of the public, as well as protection of business itself against the unscrupulous competition which the marketing of the highly dangerous merchandise may generate, requires legislation along the general line of H. R. 2768 which is directed to providing a means of forestalling the introduction into commerce of the dangerous merchandise.

Once the merchandise leaves the factory it quickly becomes so scattered into various channels of trade that instances of burning of consumers are bound to occur because of the inability adequately to trace the articles or have them removed from sale. This points up the importance of the prophylactic character of the bill.

In our opinion passage of the legislation, subject to the matters suggested above, will go far toward providing necessary protection of the public, as well as protection of those merchants or dealers who in instances may innocently handle the goods in ignorance of the dangers they are thereby imposing upon their customers.

By direction of the Commission.

Sincerely yours,

JAMES M. MEAD, *Chairman.*

N. B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on March 19, 1953, and on March 20, 1953, the Commission was advised that there would be no objection to the submission of the report to the Committee.

JAMES M. MEAD, *Chairman.*

[NOTE.—A similar report was received from the Federal Trade Commission on H. R. 389, a bill practically identical to H. R. 2768, and generally similar to H. R. 5069.]

THE SECRETARY OF COMMERCE,
Washington 25, April 15, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in further reply to your communications of February 10, March 12 and 25, 1953, requesting the views of this Department with respect to H. R. 2768, H. R. 3851, and H. R. 4159, respectively, bills to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

We believe that legislation for this purpose is essential for the protection of the public. Recent newspaper accounts of loss of life of children and adults caused by ignition of clothing, such as the appropriately designated "explosive sweaters," make out a case for the need for regulation in this field. State action is generally limited to regulation at the point of sale to the ultimate user. State action also falls on the usually innocent retailer rather than on the manufacturer who, in contrast to the retailer, is in a position to know of the potential dangerous character of the fabric utilized in making the garments. Because of the interstate traffic in these materials, Federal regulation appears to be the only effective means of eliminating the hazard.

We wish to invite your attention to the fact that H. R. 4159 and H. R. 3851 provide that the standard of flammability shall be the commercial standard now in effect and any modification thereof shall be made in accordance with presently existing procedures for the development of commercial standards.

The assent of a large segment of the affected industry is required before standards are placed in effect or modified under presently existing procedures. Where adherence to commercial standards is purely voluntary, this procedure is satisfactory. The required assent to modifications of the standards of flammability by a substantial number of the persons to be regulated by the proposed law raises a question of the constitutionality of the delegation of authority to establish modifications in the standard. The applicable law is not clear. In any event, the policy involved appears subject to question.

For these reasons, H. R. 2768, which does not require industry approval of changes in the present standard, is, in our opinion, preferable if certain minor amendments are made thereto.

On page 5, line 22 should read "Commercial Standard CS191-53, 'Flammability of Cloth'".

On page 5, line 24, the words "shall be effective" should be inserted before the period.

On page 6, line 24, the first word should read "cause".

On page 10, lines 5 and 6, the words "under the presently existing procedures for the establishment of commercial standards" should be deleted since the present procedures for establishing standards do not relate to the furnishing of guarantees.

Subject to your consideration of these amendments, the Department recommends enactment of H. R. 2768.

We have been advised by the Bureau of the Budget that there would be no objection to our submission of this letter.

If we can be of further assistance in this matter, please call on us.

Sincerely yours,

C. R. SHEAFFER,
Assistant Secretary of Commerce.

[NOTE.—The reported bill H. R. 5069 is generally similar to the abovementioned bills.]

DEPARTMENT OF AGRICULTURE,
Washington 25, D. C., May 1, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. WOLVERTON: This is in response to your request of February 10 for a report on H. R. 2768, a bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

This Department has an interest in the proposed legislation as it relates to the utilization of fibers of agricultural origin in the manufacture of yarns and fabrics used in clothing and as it relates to the protection of the public from dangerously flammable materials.

The bill would impose various prohibitions upon the manufacture and distribution of articles of wearing apparel and fabrics for use in wearing apparel which are so highly flammable as to be dangerous when worn by individuals. The bill provides that the Secretary of Commerce shall establish test methods, procedures, and standards for use in determining high flammability within the meaning of the proposed act but apparently would allow the use of the present Commercial Standard for Flammability of Clothing Textiles promulgated by the Secretary of Commerce until other test methods, procedures, and standards are promulgated by him under the bill.

The development of an impartial standard of flammability requires measuring the speed of burning of fabrics and its correlation with associated human hazards involving careful scientific experimentation and application of the results. The National Bureau of Standards in the Department of Commerce has already given attention to procedures and standards for determining the rapid and intensive burning of wearing apparel and fabrics, and, we understand, is in position to make recommendations on the formulation of appropriate test methods, procedures and standards for determining high flammability. Since such information is available, we suggest that the standard of flammability be defined in paragraph 2 of section 4, and that the last paragraph of this section be deleted. If this suggestion is adopted, the definition of commercial standard in subsection 2 (i) on page 3 of the bill should also be omitted.

This Department recommends that, with the changes specified above, this bill be given favorable consideration.

The Bureau of the Budget advises that from the standpoint of the program of the President there is no objection to the submission of this report.

Sincerely yours,

E. T. BENSON, *Secretary.*

[NOTE.—A similar report was received from the Department of Agriculture on H. R. 389, a bill practically identical to H. R. 2768, and generally similar to H. R. 5069.]

BOARD OF COMMISSIONERS,
DISTRICT OF COLUMBIA,
March 19, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
United States House of Representatives,
Washington, D. C.

MY DEAR MR. WOLVERTON: The Commissioners have for report H. R. 389 and 2768, 83d Congress, substantially similar bills to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

The Commissioners are of the view that the proposed legislation, if enacted, would tend to prevent such occurrences as the tragedies occurring in 1945 and 1946, involving the death of 1 child and the injury of 3 others as the result of wearing highly flammable cowboy suits having fleecy, brushed rayon pants. Further, in early January 1952, only the prompt action of the fire marshal of the District of Columbia, coupled with widespread publicity, brought to the attention of the public the great danger inherent in the wearing of certain sweaters then being sold in the District by a number of itinerant vendors. These sweaters, of a highly flammable, almost explosive fabric, were similar to those causing injury elsewhere in the United States, and it is believed that had the fire marshal not acted promptly, these sweaters might have caused injury, and perhaps death, to residents of the District. H. R. 2768, if enacted, would tend, it is believed, to reduce the likelihood of such sweaters, and similar highly flammable apparel and fabrics, being brought into the District for purposes of sale.

The Commissioners desire to point out that the third paragraph of section 4 of H. R. 2768 appears to be incomplete, and perhaps should be completed by inserting, immediately before the period at the end thereof, a comma and the phrase "shall be applicable". Further, the word "cease" appearing in line 24 of page 6 of H. R. 2768, and in line 1 of page 7 of H. R. 389, probably in each case should read "cause".

H. R. 2768, with its reference in the third paragraph of section 4 to the promulgation of "Commercial Standards CS 191-53, 'Flammability of Clothing Textiles,'" as compared with the reference in the same paragraph of H. R. 389 to "Recommended Commercial Standard for Flammability of Clothing Textiles, TS-5131," would appear to supersede H. R. 389. Accordingly, the Commissioners make no recommendation with respect to H. R. 389, but recommend the enactment of H. R. 2768 as being in the welfare of, and constituting a safeguard for, the residents of the District of Columbia.

As you requested in your letter of January 12, 1953, on H. R. 389, and of February 19, 1953, on H. R. 2768, this report is being submitted in sextuplicate, so as to provide three copies for your files on each of these bills.

The Commissioners have been advised by the Bureau of the Budget that there is no objection on the part of that office to submission of this report to the Congress.

Very sincerely yours,

F. JOSEPH DONOHUE,

President, Board of Commissioners, District of Columbia.

[NOTE.—The reported bill, H. R. 5069, is generally similar to the above-mentioned bills.]

FEDERAL TRADE COMMISSION,

April 9, 1953.

Hon. CHARLES A. WOLVERTON,

*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in response to your communication of March 20, 1953, requesting report and comment upon H. R. 3851 entitled "A bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes" (83d Cong., 1st sess.).

The text of this bill is in large part identical to that found in H. R. 389 and H. R. 2768, as to which we have heretofore submitted comment. In the circumstances, the new bill, H. R. 3851, retains certain points as well as some others which we believe merit careful consideration by the Congress. Our suggestions and comments in regard thereto are presented below.

We wish, however, to state at the outset that the problem to which the proposed legislation is directed has been the subject of much attention by the Commission. In our view the need for more adequate protection of the public against the hazards and risks arising from the marketing of textile merchandise of highly flammable character is a pressing one.

SCOPE OF H. R. 3851

(1) It will be noted that the bill in its scope is limited to certain articles of wearing apparel and fabrics which are intended or sold for use in wearing apparel. Therefore, such items as blankets for children and adults, bedspreads, laprobes, upholsteries, draperies, stuffed toys, rugs, and household textiles generally are not covered by the measure. These fabrics used in the home can be highly flammable and involve much danger to individual safety in their customary use which is in close contact with persons in the family. They may be especially hazardous to small children and elderly persons who, it may be assumed, are not able to act with as much speed or agility for protecting themselves in the event of fire as are the normal, active, in-between ages.

Exclusion of these textiles, therefore, presents a serious question as to whether the bill should be enlarged in its scope so as to be applicable to such household or family textiles when they are so highly flammable as to be seriously dangerous to individuals in their ordinary use in the home.

We feel that these additional items when made of dangerously flammable materials should not be excluded from the bill unless the committee prefers to have them treated in separate legislation. This might well be deemed by the committee to be a desirable course to follow in view of the apparent need of having at least partial coverage speedily enacted into law.

(2) With respect to the exception provided in section 2 (d) of "hats, gloves, and footwear," it is noted that such is limited by provisos. In previous consideration of legislation of this type we had suggested restrictions of the character set forth in these provisos. Unless restricted at least to the extent thereby attempted, the exemption of hats, gloves, and footwear, it appears, would in instances leave the public exposed to the dangers against which the bill is intended to afford protection.

Without the limiting provisions, such wearing apparel as hoods, baby bonnets, head scarves, and types of headwear which cover the neck, face, or shoulders, are likely to be excluded from the law, although when made of fabrics which under the standards of the bill exhibit rapid and intense burning, they can present hazards of most serious consequence. For the same reason the limitations also properly prevent an exception being accorded to gloves which are very long or are part of another garment, to hosiery, and to types of footwear that form part of another article of wearing apparel. In the event of their becoming ignited these articles present difficulty with respect to the possibility of their quick removal from the person. Such factor is of considerable importance since avoidance of dangerous burns depends in large measure upon the ease and speed with which the garment can be taken off by the wearer.

While not wholly removing the exemption of hats, gloves, and footwear, we believe the provisos set forth in section 2 (d) are necessary to afford certain reasonable limitation of the character mentioned in the interest of protecting the consumer.

(3) Among further exemptions from the measure is that of "fiber, filament, or yarn" as provided in section 2 (e). Textiles within this exempt class are used extensively for hand knitting and making into garments in the home. The hand knitting of sweaters for children and grownups, and other use of yarns and filaments in connection with family-made garments or articles are not uncommon. It appears that materials in this class, especially those of the rather loose or soft type, can be of highly flammable and hazardous character.

In the circumstances it is our view that the exception of fiber, filaments, and yarns contained in section 2 (e) should be removed so that the measure will not exempt from its scope those filaments and yarns sold to ultimate consumers for home knitting or making into garments which in their normal and intended construction and use are so highly flammable as to be dangerous to individuals.

The ordinary yarns or filaments widely used in the home, and which are not of such highly flammable and dangerous character, would not be disturbed by removal of this exemption because the restrictions imposed by the bill are intended to apply only to the materials which exhibit such rapid and intense burning as to be dangerous when worn by individuals.

STANDARD OF FLAMMABILITY

(4) Section 4 of the bill specifies the Commercial Standard CS 191-53 as the required test for dividing between those fabrics and articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals, and those which are not. This commercial standard was developed, according to our understanding, by the industry under the procedures of the Department of Commerce and the National Bureau of Standards.

The efficacy of the entire legislation under the language of the bill would depend upon whether or not this standard is in fact adequate from the standpoint of affording due protection of the consuming public. It provides, for example, that if, after the fabric has been dry-cleaned and washed, 4 seconds or more are required to burn it a distance of 6 inches when placed at a 45° angle in a draftproof ventilated cabinet, that fabric shall not be considered under the ban of the test and consequently not under the control of this bill. It will be noted that the line of demarcation between the good and the bad, in respect to inflammability, is so finely drawn that 1 second of burning determines whether or not the article is of a dangerous character.

As indicated the terms of the standard specifically provide that the fabric shall be evaluated on the basis of its first having undergone dry-cleaning and washing. Dangerously flammable sweaters which gave rise to a rash of burnings in different parts of the country and against which the Commission has proceeded under the limited powers now available to it, involve cases which took place before the sweaters were washed or dry-cleaned. For the most part, consumers do not wash or dry-clean new garments until after they have been worn for a considerable period of time. Therefore, the hazards that should be guarded against not only are those which take place after washing and dry-cleaning, but also the dangers and risks involved in wearing the garment before it has been dry-cleaned or washed. There may be a serious question in the circumstances as to whether the test procedure of the standard is realistically adjusted to conditions applicable to the consumer in his normal use of the garment.

We feel that the standard of flammability fixed should necessarily be one that is found to be adequate to afford that due protection of the consumer which it is the purpose of the legislation to achieve. While the commercial standard specified

has been promulgated by the Department of Commerce, it is our understanding that this does not constitute a finding or ruling either by the National Bureau of Standards or by the Secretary of Commerce that in their opinion such standard is adequate from the standpoint of the public.

We regard the necessity of making this finding of adequacy in the public interest as highly important.

The working out of a proper test method involves technical skills and the operation of scientific apparatus, and we are of the opinion that the scientific and technical facilities available in the National Bureau of Standards in the Department of Commerce should be utilized for making the official finding and ruling of adequacy of whatever test method is to be sanctioned by law as determinative.

(5) Further, it is provided in section 4 (b) of H. R. 3851 that when in his opinion the protection of the public interest so requires, the Secretary of Commerce is authorized to modify or supplement the test standard of flammability, provided he follows the procedure used in setting up Commercial Standard 191-53. This requirement would prohibit the Secretary of Commerce from modifying or supplementing the test unless he obtained the consent of 65 percent of the industry or at least of a majority, which is a requirement of the commercial standard procedure. Such presents an unprecedented situation of having the standard of legality or illegality under a penal and civil statute turn upon the consent of the industry to which the legislation applies.

The duty of the Secretary of Commerce to determine appropriate and adequate test standards is highly important and should not in our opinion be subjected to a veto by the industry but should be controlled by what is necessary for proper protection of the public interest. Under the proposed legislation the public's protection against dangerously flammable textile depends almost wholly upon the adequacy of the test method sanctioned by the law.

We suggest in the circumstances that the proviso in section 4 (b) be deleted. A requirement for extending opportunity for hearing and consultation with the industry and all parties concerned when issuing, modifying, or supplementing the test standards remains available under the Administrative Procedure Act.

Section 2 (i), among the definitions in the bill, should also be deleted as superfluous since the commercial standard mentioned is fully and effectively identified in section 4.

GUARANTIES

(6) The guaranty provisions contained in section 8 of H. R. 3851 are considerably different from those contained in the corresponding sections of H. R. 389 and H. R. 2768 previously presented. Under H. R. 3851 the guarantor would not as provided in the other bills guarantee that the product is safe under the test specified or that it is not so highly flammable as to be dangerous to individuals when worn. It would merely warrant in effect "that reasonable and representative tests" have been made and that these show the specific type of fabric when tested under the standard "was not highly flammable within the meaning of section 3."

Fabrics are produced and sold in large bolts containing hundreds of yards. It is generally contended that the test applied to one or more parts of such fabric may indicate it is not highly flammable, whereas tests of various other parts of the same bolt of fabric may show it to be highly flammable and dangerous. If tests made happen not to touch the latter parts or yardage of the bolt, garments made therefrom will necessarily be highly flammable and dangerous and yet will reach the public under an approved guaranty.

In the circumstances of these variables and the debatable point of what shall constitute reasonable and representative tests, there is serious doubt that the guaranty could afford much assurance of safety of the product although it would accord immunity from the act to all subsequent processors, manufacturers, distributors, and dealers.

A further point arises from the insertion in section 5 respecting the enforcement power against a false guaranty. Enforcement is thereby restricted to prevention of "knowingly issuing a false guaranty." It would be most difficult, if not impossible, for the administering agency to sustain the burden of proving the fact of "knowingly" issuing a false guaranty and of showing that the manufacturer has not within the confines of his plant or elsewhere subjected the fabric to "reasonable and representative tests," which is all the guaranty asserts.

Such provisions of the bill are materially unlike those heretofore enacted in rather comparable situations, namely, the Wool Products Labeling Act of 1939 (15 U. S. C. A. 68), the Fur Products Labeling Act passed in 1951 (15 U. S. C. A.

69), and the Food, Drug, and Cosmetic Act of 1938 (20 U. S. C. A. 331 (h), 333 (c)).

Under these statutes, to obtain the immunity which the guaranty provisions afford throughout the channels of trade, the party who desires to exercise his optional right of using a guaranty is required to specifically warrant the product to be of a type which meets the requirements of the law. These laws also provide definite and specific authority for civil enforcement against a party who gives a false guaranty, leaving to the criminal provision the offense of willful falsification. Similarly adequate enforcement authority is lacking in H. R. 3851.

The guaranty provisions used in the Wolverton bill, H. R. 2768, and in the earlier Canfield bill, H. R. 389, follow in substance those found in the above-mentioned statutes. We believe them to be preferable and it is therefore suggested that the guaranty section in the Wolverton bill, H. R. 2768, or that appearing in H. R. 389 which is identical, be used with, however, omission after the word "establishes" of the inapplicable clause, "under the presently existing procedures for the establishment of commercial standards." As so recommended the section would then read:

GUARANTY

"SEC. 8. (a) No person shall be guilty under section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, that said wearing apparel or fabric is not so highly flammable as to be dangerous when worn by individuals under the provisions of this Act. Such guaranty shall be either (1) a separate guaranty specifically designating the wearing apparel or fabric guaranteed, in which case it may be on the invoice or other paper relating to such wearing apparel or fabric; or (2) a continuing guaranty filed with the Commission applicable to any wearing apparel or fabric handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

"(b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act."

Such suggested amendment also requires restoration of the designation "or 8 (b)" to section 7 immediately after the clause "Any person who willfully violates section 3".

Correspondingly, the designation "or 8 (b)" should be inserted in section 5 (b) in lieu of the clause "or from knowingly issuing a false guaranty under section 8".

In relation to the subject it should be noted that the issuance of a guaranty is not a requirement, but is an optional right accorded to the manufacturer or seller by which he may, if he so desires, confer immunity upon those who subsequently handle his product in the course of trade. It appears highly important, especially in view of the immunity conferred, that these provisions contain adequate safeguards against the possibilities of grave injuries resulting from articles of highly flammable goods sold to the public as made of so-called guaranteed fabrics.

COMMISSION'S SUPPORT OF LEGISLATION

The problem of dangerously flammable textiles reaching the market and being purchased by consumers who are innocent and unaware of their dangerous character has broken out in cycles and has led to a series of instances in which consumers have suffered severe burns and even death. The Commission, pursuant to its authority to act in prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act, has proceeded to the extent of its powers to protect the public in respect to such hazardous and dangerous merchandise. Numerous cases have been investigated and after hearings cease and desist orders were issued in due course against parties placing fabrics or garments in the channels of interstate commerce made in such way as to be highly flammable and dangerous.

The Commission does not have authority under present law to forestall the introduction of these products into the channels of trade, but can only proceed after the material has gotten into the market. Adequate protection of the public, as well as protection of business itself against the unscrupulous competition which the marketing of the highly dangerous merchandise may generate, requires legislation directed to the purpose expressed in H. R. 3851 of providing a means to forestall the introduction into commerce of the dangerous merchandise.

Once the merchandise leaves the factory it quickly becomes so scattered into various channels of trade that instances of burning of consumers are bound to occur because of the inability adequately to trace the articles or have them removed from sale. This points up the importance of the prophylactic character of the bill.

We are of the opinion that passage of the legislation amended to cover the matters suggested above will go far toward providing necessary protection of the public, as well as protection of those merchants or dealers who in instances may innocently handle the goods in ignorance of the dangers they are thereby imposing upon their customers.

By direction of the Commission.

Sincerely yours,

JAMES M. MEAD, *Acting Chairman.*

N. B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on April 9, 1953, and on April 15, 1953, the Commission was advised that there would be no objection to the submission of the report to the committee.

EDWARD F. HOWREY, *Chairman.*

[NOTE.—An identical report was received from the Federal Trade Commission on H. R. 4159, a bill identical to H. R. 3851.]

DEPARTMENT OF AGRICULTURE.
Washington 25, D. C., May 1, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. WOLVERTON: This is in response to your request of March 12, 1953, for a report on H. R. 3851, a bill to prohibit the introduction or movement in interstate commerce or articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes. This Department has an interest in the proposed legislation as it relates to the utilization of fibers of agricultural origin in the manufacture of yarns and fabrics used in clothing and as it relates to the protection of the public from dangerously flammable materials.

This bill would impose various prohibitions upon the manufacture and distribution of articles of wearing apparel, and fabrics for use in wearing apparel, which are so highly flammable as to be dangerous when worn by individuals. The bill provides for the use of commercial standards promulgated by the Secretary of Commerce for determining high flammability under the act.

The development of an impartial standard of flammability requires measuring the speed of burning of fabrics and its correlation with associated human hazards involving careful scientific experimentation and application of the results. The National Bureau of Standards in the Department of Commerce has already given attention to procedures and standards for determining the rapid and intensive burning of wearing apparel and fabrics, and, we understand, is in position to make recommendations on the formulation of appropriate test methods, procedures, and standards for determining high flammability. Since such information is available, we suggest that the standard of flammability be defined in paragraph (a), section 4, and that paragraph (b) of this section be deleted.

This Department recommends that, with the changes specified above, this bill be given favorable consideration.

The Bureau of the Budget advises that from the standpoint of the program of the President, there is no objection to the submission of this report.

Sincerely yours,

E. T. BENSON, *Secretary.*

[NOTE.—An identical report was received from the Department of Agriculture on H. R. 4159, a bill identical to H. R. 3851.]

Calendar No. 40383d CONGRESS }
 1st Session }

SENATE

{ REPORT
No. 400**PROHIBITING THE INTRODUCTION OR MOVEMENT IN
INTERSTATE COMMERCE OF FLAMMABLE FABRICS**

JUNE 11 (legislative day, JUNE 8), 1953.—Ordered to be printed

Mr. TOBEY, from the Committee on Interstate and Foreign Commerce,
submitted the following

R E P O R T

[To accompany H. R. 5069]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 5069) to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

SENATE COMMITTEE ACTION

In reporting favorably and without amendment the bill, H. R. 5069, this committee has been aware of a number of differences, most of them minor, between the reported bill and S. 2918, a similar bill reported by this committee last year. The committee felt, however, that H. R. 5069, represents a distinct improvement over last year's S. 2918, especially in section 4, concerning the standard of flammability. The compromise reached by the House committee on the procedure to be used in the event the Secretary of Commerce believes changes in the test methods, procedures, and standards for determining degree of flammability are necessary in the public interest, is a good one. It satisfies both the industry's objections to complete discretion being lodged with the Secretary as well as objections to a continuation of those procedures under which the current "Commercial Standard 191-53" was established—which procedures, if enacted into law, are considered by many as an unconstitutional delegation of rulemaking power. The House solution places responsibility for changes in the applicable commercial standards on the Congress, where such responsibility should rest.

Because of this committee's thorough agreement with the House version of flammable fabrics legislation, the committee adopts House Report No. 425, 83d Congress, 1st session, as most suitable for its purposes. There is being added, however, are portions from the Department of Justice on S. 715, a similar bill, containing pertinent recommendations. In adopting the House report, the committee desires to note that it follows to a considerable extent much of its own report, No. 1869, on S. 2918 last year.

PURPOSE OF LEGISLATION

The purpose of the bill here being reported, which has this committee's unanimous approval, is to protect the public from the danger surrounding the use in wearing apparel of highly flammable textiles of the types which have caused either bodily injury or death to numerous individuals. The bill is limited in scope to wearing apparel and fabrics which are intended or sold for use in wearing apparel. It will outlaw, for example, the introduction, movement, or sale in interstate commerce of highly flammable children's cowboy playsuits, and the so-called torch sweaters or jackets which have caused serious injuries and death to a number of innocent and unsuspecting individuals in recent years.

HEARINGS

On April 16, 28, and 29, 1953, the House Committee on Interstate and Foreign Commerce held public hearings on five similar bills, H. R. 389, by Mr. Canfield of New Jersey; H. R. 2768, by Mr. Wolverton of New Jersey; H. R. 3851, by Mr. Canfield of New Jersey; H. R. 4159, by Mr. Johnson of California; and H. R. 4500 by Mr. Williams of Mississippi. The principal objective of all these bills is to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals. H. R. 5069, the reported bill, was introduced by Mr. Wolverton, chairman of the House committee, and at the direction of the committee, as a "clean" bill as a result of the committee hearings and after executive consideration of all the bills pending before the committee.

Every witness who testified before the committee, without exception, representing virtually all segments of the textile industries and trades, urged prompt and effective Federal legislation to protect the public from the dangers of highly flammable wearing apparel and fabrics used in wearing apparel, and supported these bills in principle. Moreover, the committee was urgently requested to take prompt action on this legislation. It was pointed out that if this legislation is not enacted, a variety of State and local regulations lacking in uniformity might very well ensue. It seems obvious that uniformity of regulation in this matter is necessary.

Testimony in support of legislation on this subject was received from the Federal Trade Commission, the National Cotton Council of America, the National Retail Dry Goods Association, the Tufted Textile Manufacturers Association, the Society of the Plastics Industry, the Rayon and Acetate Fiber Producers, and others.

NEED FOR THE LEGISLATION

Actual experiences in the past show that the risks and possibilities of bodily harm suffered by consumers in the use of highly flammable wearing apparel are severe and most dangerous. Still fresh in our minds is the great wave of burnings and even deaths which children have suffered when wearing highly flammable cowboy playsuits. More recently, there have been a number of cases involving the so-called explosive sweaters which were sold to the public by itinerant vendors.

The Federal Trade Commission cited a number of these incidents. One man lost his sweater in flames while sitting in a courtroom. In another instance a man driving his automobile lit a cigarette which ignited his sweater. He succeeded in pulling it over his head but suffered second- and third-degree burns on his face, neck, and hands. His car jumped the curb and collided with a telephone pole. Instances of severe burns suffered by individuals were reported from many parts of the country. A General Motors employee reported that he lit a cigarette while wearing his new Christmas sweater and that four fellow employees saved his life by beating out the flame. He said:

It was a terrifying thing. It was just as if you threw a match into a rag soaked with gasoline. There was that same "poof" sound, and all of a sudden flames were all over me.

Other examples of the danger inherent in apparently innocent but nevertheless highly flammable wearing apparel were given by Dr. Frederic Bonnet, adviser to the president of the American Viscose Corp., when he testified in 1947 before this committee on similar proposed legislation. Here is his description of a few of these tragedies and near tragedies:

Martha M. Gross, Kansas City, Mo., had a sweater patterned after angora, having long, fuzzy nap, purchased in Baltimore. The head of a match flew off against the sweater, igniting it. Her brother and sister came to her rescue and both were burned. She was very ill and suffered disfiguring scars and her hands were injured so that she could no longer follow her profession, which was that of a stenographer and secretary.

I would like to add here that she sent a very pathetic letter to the National Bureau of Standards, and to other departments, asking whether something could not be done to prevent such accidents happening to others. She said it was all over with her case, but certainly life was still dear in America.

Then, we have the case of Doris E. Dissenbach who was injured when a cotton chenille dressing gown took fire.

Georgia Stevens, 18-year-old coed, was burned to death at a sorority initiation rite last spring at the University of Texas. It was a candlelight initiation and her gown brushed against a lighted candle. She died the next morning.

Virginia Black wore a white tulle dress at a coming-out dance at the St. Regis Hotel. The dress caught fire and she was severely burned. She is still in the hospital, I understand.

Angelica and Harry Murphy are bringing suit for \$125,000 because of some apron material, a coated fabric so highly flammable that when it came in proximity of a heated stove it took fire and severely burned her and her husband.

Mary Lee Cummings, aged 5, Whittier, Calif., was wearing a plastic raincape and backed into a radiant heater which ignited the plastic, causing second-and third-degree burns from which she died. That is the one that Mr. Dorn referred to in his testimony, and was reported by the California State fire marshal.

I need hardly refer you to the twenty-odd boys 3 to 8 years of age who were burned, maimed, and 6 of whom died, as the result of burns sustained when their cowboy suits took fire.

The National Fire Protective Association records the following:

In Oakland, Calif., a girl died from burns received when her costume caught fire at a lodge entertainment.

In Magnolia, Ark., a Negro woman died from burns received when a grass dress caught fire from a can heater in a dressing room of a traveling minstrel show.

In Omaha, Neb., a child dressed in an Indian costume which caught fire from the lighted jack-o'-lantern she was carrying. She suffered fatal burns.

I might add that children go to communion or confirmation carrying lighted candles, and have been injured.

In New Orleans on February 12, 1947, a bride, Mrs. Jess Rockenbaugh, was wearing a bathrobe which caught on fire. She was saved by her husband who cut the robe belt and pulled off the robe, but not before she suffered third-degree burns, and she is still in the hospital.

In Old Greenwich, Conn., a man's pajamas caught fire from the kitchen range. He suffered fatal burns. Those were cotton nap pajamas.

In Portland, Oreg., a man died of burns received when his trouser leg became ignited by a match. I do not know what he was wearing.

In Washington, D. C., a child's costume became ignited from a candle in a jack-o'-lantern. She was out in the yard when the accident occurred. She suffered fatal burns.

In Indianapolis, Ind., a woman pulled a light plug from a receptacle when a short circuit occurred, throwing sparks onto her dress. She suffered fatal burns.

In Yonkers, N. Y., a 4-year-old child was turned into a blazing torch as her Hallowe'en costume was ignited by a jack-o'-lantern. She died in a hospital.

In Detroit, Mich., a man died of burns when his bathrobe caught fire when he was tending the furnace in his home.

In Denver, Colo., a woman suffered fatal burns when her clothing ignited while standing in front of a lighted fireplace.

I might mention a few others mentioned this morning. Namely: Mrs. Booth Tarkington was wearing some hair combs and was drying her hair in an ordinary hair dryer when she suffered severe burns owing to the ignition, spontaneous ignition, of those combs.

There was also a case of a woman sitting in front of a chafing dish wearing nitrocellulose buttons. These buttons practically exploded in her face and set her afire. She died of her injuries. This is given in Coronet under the heading of an article headed "Fire Trap."

I need not go on, I think, with the recitation of these cases. They extend over many years. They have grown more numerous within recent years.

In January 1952, a rash of burnings took place, involving highly flammable sweaters. Some of these cases are summarized below:

SOME NEWSPAPER CLIPPINGS RECEIVED BY THE FEDERAL TRADE COMMISSION RELATING EXPERIENCES INDIVIDUALS HAVE HAD WITH DANGEROUSLY FLAMMABLE BRUSHED RAYON WEARING APPAREL

The Kansas City Times of January 9, 1952, reported under Los Angeles dateline of January 8 that the fire captain of Los Angeles had received reports of at least a dozen cases in which brushed fabric sweaters had caught fire and at least eight persons injured by burns.

The Kansas City Star of January 10, 1952, reported that Paul Blake of Kansas City ignited a cigarette w th his lighter and when he placed the lighter into the sweater pocket, the sweater burst into flames. Four fellow employees saved him from burns by beating the flames out after half the sweater had been consumed.

The New York Times of January 12, 1952, reported that Robert Flavin of Long Branch, N. J., was burned on both hands the day previous when a sweater he was wearing flared up as he struck a match to light a cigarette.

The New York Sunday News of January 13, 1952, reported that Mrs. Mary Sheffield of Newark, N. J., was burned about both hands when the sweater she was wearing suddenly burst into flames as she turned on her gas stove to prepare a meal. The same issue newspaper reported that at least 20 persons throughout the country had been injured by flaming sweaters.

The Norristown (Pa.) Times of January 14, 1952, reported that Edward C. Martin of Schwenkville lighted a cigarette with a match and the sweater he was wearing went up "like a Roman candle." A friend extinguished the fire by throwing water on the sweater but not before Martin's neck was scorched.

The Washington Post of January 16, 1952, reported that J. Patrick Staubs of Silver Spring, Md., escaped serious injury the previous Sunday when the sweater he was wearing on a golf course caught fire as he lighted a cigarette.

The Federal Trade Commission undertook in the problem of the flaming sweaters to exercise, to the fullest, such powers as it presently has in an effort to protect the public, but as the Commission's witness pointed out during the course of the hearings, the present law is inadequate to cope fully with the problem. Legislation is needed to make it possible effectively to forestall the introduction into the market of these highly flammable products. After the dangerous articles leave the factory and get into one or more of the many channels of trade, it becomes impossible to track them down in time to prevent persons from being badly burned and even suffering death, as in the case of the playsuits which were worn by children when they took fire and resulted in the death of many of them. Legislation in which the corrective power is of a preventive nature is required to be effective in reaching the evil, as well as power to enjoin and stop continued distribution of the dangerous articles.

Your committee is advised by the Federal Trade Commission that the authority conferred by existing statutes is not adequate to forestall the danger to the public in this situation, or even to provide a temporary stop order during the time that is required for litigation to follow its necessary course to final application of the corrective power. The Commission further advises that the right of applying a temporary restraining order or injunction, or of preventive inspections, is presently not available to it. Furthermore, there is now no direct statutory authority to keep dangerously flammable garments out of the channels of interstate commerce.

Charles W. Dorn, director of the research laboratory of the J. C. Penney & Co., and chairman of the technical committee of the National Retail Dry Goods Association, appearing before the committee in support of this legislation, gave still another cogent reason for its enactment. He testified that—

The NRDGA has always believed that the United States grew strong because of the sovereignty of the individual States and has stanchly opposed extension of Federal jurisdiction over matters best handled at the State level. In this instance, however, we firmly believe that the Congress must lead the way. Recently several States and a number of city and other local bodies have considered legislation on the subject of dangerously flammable apparel. Only one State, California, has adopted such legislation. The confusion which is bound to result if the several States were to legislate individually on this subject is obvious, for in the absence of a national standard, each State and local community would provide for different guides or measurements. I can readily testify that this is not an idle conclusion, for in the past months the possibility of a Federal enactment has been the sole basis for postponing very unsatisfactory legislation in several States.

Failure by this Congress to act undoubtedly will cause a flood of haphazard local legislation which will not only bring on an impossible situation in the textile industries, but, more important, will deny to many consumers the responsible protection contained in the proposed bills.

The manufacturers of your respective States would have great difficulty in producing garments or fabrics which would comply with the different requirements of 2 or 20 different State acts, to say nothing of different local ordinances. And those residents of States which failed to act would have no protection at all. For these reasons I urge the Congress to legislate on this subject and thus insure uniformity and protection for all.

HISTORY OF LEGISLATION

Bills to prohibit the transportation in interstate commerce of highly flammable fabrics and wearing apparel have been introduced in the House beginning with the 79th Congress, 1st session (1945). In the 80th Congress, the House committee held extensive hearings on three flammable fabric bills, namely, H. R. 505, by Mr. Canfield, of New Jersey; H. R. 601, by Mr. Johnson, of California; and H. R. 1111, by Mr. Arnold, of Missouri. Similar bills were introduced during the 81st and 82d Congresses. In the 82d Congress, the Senate passed unanimously on July 3, 1952, S. 2918, a bill similar in many respects to the reported bill H. R. 5069. S. 2918 was reported by the House committee on July 4, 1952. The House took no action on that bill prior to the adjournment of the Congress on July 7, 1952.

STANDARDS OF FLAMMABILITY

The major problem in formulating legislation to control the use of dangerously flammable textiles is to discriminate between the conventional fabrics that present moderate and generally recognized hazards and the special types of fabrics which present unusual hazards and are highly dangerous.

The rate of burning of a garment or other textile product depends upon the kind of fiber, the finishing materials present, the structure of the yarn and fabric, and such circumstances as the relative humidity. In general, wool textiles ignite and burn with difficulty while cotton and rayon ignite and burn more readily. The major hazards arise from certain cotton or rayon fabrics having fuzzy or furlike surfaces which flash and burn with exceeding rapidity. Most synthetic textiles melt when heated and the molten material is capable of producing serious burns on coming in contact with the skin.

Section 4 of the bill prescribes the standards of flammability. Commercial Standard 191-53, promulgated by the Secretary of Commerce effective January 30, 1953, prescribes the standard for flammability of clothing textiles and Commercial Standard 192-53, promulgated by the Secretary of Commerce effective May 22, 1953, prescribes the standard of flammability for vinyl plastic film.

Commercial Standard 191-53 is a voluntary standard developed through the combined effort of a number of scientific and technical groups and represents the combined opinion of an industry committee speaking for the cotton and rayon producers, and fabric manufacturers, finishers, converters, wholesalers, retailers, and consumers coordinated by the American Association of Textile Chemists and Colorists and the National Retail Dry Goods Association. The National Bureau of Standards participated in this work by active service on technical committees, by the conduct of a wide variety of investigational and testing work, and by aiding in the reconciliation of different points of view.

The flammability test provided in the Commercial Standard 191-53 makes use of strips of fabric 2 by 6 inches in dimensions. The test consists of measuring the burning time in seconds when the test piece is mounted in a specially designed apparatus and a flame is applied in a prescribed manner. Fabrics with a flame spread of more than 7 seconds are classed as having normal flammability. Those with a

flame spread of less than 4 seconds are classed as rapid and intense burning, while those burning in 4 to 7 seconds are rated as having intermediate flammability. This bill is directed to those fabrics which are classed as rapid and intense burning fabrics.

Commercial Standard 191-53 states that this standard shall not apply to hats, gloves, and footwear. Notwithstanding this specific exception made in the standard, it is the intention of your committee that this standard shall be applicable to the hats, gloves, and footwear defined in section 2 (d) of this act. Commercial Standard 192-53 makes no exception to hats, gloves, and footwear.

Commercial Standard 192-53 is the industry-approved standard with respect to vinyl plastic film. Such film is used in the manufacture of various articles of wearing apparel such as raincoats, capes, hoods, pants, and aprons. The flammability test is prescribed in paragraph 3.11 of this standard.

Section 4 provides further that if at any time the Secretary of Commerce finds that the commercial standards referred to above are inadequate for the protection of the public interest, he shall submit to the Congress a report setting forth his findings, together with such proposals for legislation as he deems appropriate.

The committee intends that the Secretary of Commerce shall make continuous studies of the suitability and effectiveness of these and related test methods in providing adequate protection to the public from the hazards of flammability.

ADMINISTRATION AND ENFORCEMENT

H. R. 5069 follows the pattern of legislation established by the Wool Products Labeling Act of 1939, and the Fur Products Labeling Act, enacted in the 82d Congress. If enacted into law, H. R. 5069 will be administered and enforced by the Federal Trade Commission. The act will take effect 1 year after the date of its enactment.

SECTION-BY-SECTION EXPLANATION OF THE BILL

Section 1 provides a short title for the act: "Flammable Fabrics Act."

Section 2 contains definitions of various terms used in the bill. "Article of wearing apparel" is defined as any costume or article of clothing worn or intended to be worn by individuals. Hats, gloves, and footwear are excepted, provided that such hats do not constitute or form part of a covering for the neck, face, or shoulders when worn by individuals; provided also that such gloves are not more than 14 inches in length and are not affixed to or do not form an integral part of another garment; and provided that the footwear does not consist of hosiery in whole or in part and is not affixed to or does not form an integral part of another garment.

The term "fabric" is limited to material that is intended or sold for use in wearing apparel, with an exception for interlining fabrics when intended or sold for use in wearing apparel. "Interlining" means any fabric which is intended for incorporation into an article of wearing apparel as a layer between an outer shell and an inner lining.

Section 3 declares that the manufacture for sale, the sale, or the offering for sale in commerce, or the importation into the United

States, or the introduction, delivery for introduction, transportation or causing to be transported in commerce or for the purpose of sale or delivery after sale in commerce, of any article of wearing apparel, or fabric, or wearing apparel made of fabric which is so highly flammable as to be dangerous when worn by individuals shall be unlawful, and an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act.

Section 4 is the "Standard of flammability" section. It provides that any fabric or article of wearing apparel shall be deemed so "highly flammable" within the meaning of section 3 as to be dangerous when worn by individuals if such fabric or any uncovered or exposed part of such article of wearing apparel exhibits rapid and intense burning when tested under the conditions and in the manner prescribed in the commercial standard promulgated by the Secretary of Commerce effective January 30, 1953, and identified as "Flammability of Clothing Textiles, Commercial Standard 191-53," or in the commercial standard promulgated by the Secretary of Commerce effective May 22, 1953, and identified as "General Purpose Vinyl Plastic Film, Commercial Standard 192-53."

If these standards are, at any time, found by the Secretary of Commerce to be inadequate for the protection of the public interest, he must submit a report to the Congress setting forth his findings, together with such proposals for legislation as he deems appropriate.

Section 5 is the administration and enforcement section. It states that sections 3, 5, 6, and 8 (b) shall be enforced by the Federal Trade Commission under rules, regulations, and procedures provided for in the Federal Trade Commission Act. It also authorizes the Commission to make inspections, tests, analyses, and examinations of any article of wearing apparel or fabric which it has reason to believe falls within the prohibitions of the act.

Section 6 provides for injunction and condemnation proceedings where the Commission deems such proceedings are warranted.

Section 7 is the criminal penalty section applicable to willful violations of section 3 of 8 (b) of the act.

Section 8 is the guaranty section. Subsection (a) provides that no person shall be prosecuted under section 7 for a violation of section 3 if such person establishes a guaranty received in good faith from the person by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received to the effect that reasonable and representative tests were made under the procedures provided in section 4, and that such tests show that the fabric covered by the guaranty, or used in the wearing apparel covered by the guaranty, is not so highly flammable as to be dangerous when worn by individuals. This subsection specifies what provisions the guaranty shall contain. Provision is made for a separate guaranty or a continuing guaranty. The furnishing of a guaranty is optional. Subsection (b) makes unlawful the furnishing of a false guaranty, and declares that any person who violates the provisions of this subsection is guilty of an unfair method of competition and an unfair or deceptive act or practice in commerce within the meaning of the Federal Trade Commission Act.

Section 9 relates to shipments from foreign countries. It authorizes penalties in the case of those persons who export or attempt to export

from any foreign country into the United States any wearing apparel or fabric which is so highly flammable as to be dangerous when worn by individuals.

Section 10 contains the usual separability clause and provides that the provisions of this act shall be held to be in addition to, and not in substitution of, the provisions of any other law.

Section 11 excludes from the provisions of the act common and contract carriers and freight forwarders, certain converters, processors, or finishers, as well as any article of wearing apparel or fabric which is shipped or delivered for shipment into commerce for the purpose of finishing or processing to render such article or fabric not so highly flammable as to be dangerous when worn by individuals.

Section 12 provides that the act shall take effect 1 year after its enactment.

Section 13 authorizes the necessary appropriations to carry out the purposes of the act.

CONCLUSION

Your committee believes that the inadequacy of present statutory powers to cope effectively with the urgent problem of protecting innocent and unsuspecting individuals from bodily injury and even death resulting from the use of wearing apparel, and fabrics used in wearing apparel, which are highly flammable makes the enactment of this legislation imperative.

REPORTS FROM EXECUTIVE DEPARTMENTS IN SUPPORT OF LEGISLATION

Reports on H. R. 389, H. R. 2768, H. R. 3851, H. R. 4159, and H. R. 4500, upon which the House committee held public hearings, were received from the Federal Trade Commission, the Department of Commerce, the Department of Agriculture, and the Board of Commissioners for the District of Columbia. These reports follow.

FEDERAL TRADE COMMISSION,
March 19, 1953.

Hon. CHARLES A. WOLVERTON,

*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.*

MY DEAR MR. WOLVERTON: This is in response to your recent communication requesting report and comment upon H. R. 2768, entitled "A bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes" (83d Cong., 1st sess.).

The problem to which the proposed legislation is directed has been the subject of much attention by the Commission. In our view the need for more adequate protection of the public against the hazards and risks arising from the marketing of textile merchandise of highly flammable character is a pressing one.

The text of the bill, H. R. 2768, appears to us to be in excellent shape with the exception of certain points which we believe merit careful consideration by the Congress. These points and our suggestions and comments in respect to them are presented as follows:

SCOPE OF H. R. 2768

(1) It will be noted that the bill in its scope is limited to certain articles of wearing apparel and fabrics which are intended or sold for use in wearing apparel. Such things, therefore, as blankets for children and adults, bedspreads, laprobes, upholsteries, draperies, stuffed toys, rugs, and household textiles generally are not covered by the measure. Fabric merchandise used in the home can be highly flammable and involve much danger to the safety of individuals in their constant

use in close contact with individuals in the family. They may be especially hazardous to small children and elderly persons who, it may be assumed, are not able to act with as much speed or agility for protecting themselves in the event of fire as are the normal, active, inbetween ages.

Exclusion of these textiles, therefore, presents a serious question as to whether the bill should be enlarged in its scope so as to be applicable to such household or family textiles when they are so highly flammable as to be seriously dangerous to individuals in their ordinary use in the home.

We feel that these additional items when made of dangerously flammable materials should not be excluded from the bill unless the committee prefers to have them treated in separate legislation. This might well be deemed by the committee to be a desirable course to follow in view of the apparent need of having at least partial coverage speedily enacted into law.

(2) With respect to the exception provided in section 2 (d) of "hats, gloves, and footwear," it is noted that such is limited by provisos. In previous consideration of legislation of this type we had suggested restrictions of the character set forth in these provisions. Unless restricted at least to the extent attempted by such provisos, the exemption of hats, gloves, and footwear, it appears, would in instances leave the public exposed to the dangers against which the bill is intended to afford protection.

Without the limiting provisions, such wearing apparel as hoods, baby bonnets, head scarves, and types of headware which cover the neck, face, or shoulders, are likely to be excluded from the law, although when made of fabrics which under the standards of the bill exhibit rapid and intense burning, they can present hazards of most serious consequence. For the same reason, the provisos likewise properly prevent an exception being accorded to gloves which are very long or are part of another garment, to hosiery, and to types of footwear that form part of another article of wearing apparel. In the event of their becoming ignited, these articles present difficulty in respect to quick removal from the person. Such factor is of considerable importance since avoidance of dangerous burns depends in large measure upon the ease and speed with which the garment can be taken off by the wearer.

While not wholly removing the exemption of hats, gloves, and footwear, we believe the provisos set forth in section 2 (d) are necessary to afford certain reasonable limitation of the character mentioned in the interest of protecting the consumer.

(3) Among further exemptions from the measure is that of "fiber filament or yarn" as provided in section 2 (e). Textiles within this exempt class are used extensively for hand knitting and making into garments in the home. The hand knitting of sweaters for children and grownups, and other use of yarns and filaments in connection with family-made garments or articles are not uncommon. It appears that materials in this class, especially those of the rather loose or soft type, can be of highly flammable and hazardous character.

In the circumstances, it is our view that the exception of fiber filaments and yarns contained in section 2 (e) should be removed so that the measure will not exempt from its scope those filaments and yarns sold to ultimate consumers for home knitting or making into garments which in their normal and intended construction and use are so highly flammable as to be dangerous to individuals.

The ordinary yarns or filaments widely used in the home, and which are not of such highly flammable and dangerous character, would not be disturbed by removal of this exemption because the restrictions imposed by the bill are intended to apply only to the materials which exhibit such rapid and intense burning as to be dangerous when worn by individuals.

STANDARD OF FLAMMABILITY

(4) Section 4 of the bill specifies the Commercial Standard CS 191-53 as the required test for dividing between those fabrics and articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals, and those which are not. This commercial standard was developed, according to our understanding, by the industry under the procedures of the Department of Commerce and the National Bureau of Standards.

The efficacy of the entire legislation under the language of the bill would depend upon whether or not this standard is in fact adequate from the standpoint of affording due protection of the consuming public. It provides, for example, that if, after the fabric has been dry-cleaned and washed, 4 second or more are required to burn it a distance of 6 inches when placed at a 45° angle in a draftproof venti-

lated cabinet, that fabric shall not be considered under the ban of the test and consequently not under the control of this bill. It will be noted that the line of demarcation between the good and the bad, in respect to flammability, is so finely drawn that 1 second of burning determines whether or not the article is of a dangerous character.

Terms of the standard provide that the fabric shall be evaluated on the basis of its first having undergone dry cleaning and washing. Dangerously flammable sweaters which gave rise to a rash of burnings in different parts of the country and against which the Commission has proceeded under the limited powers now available to it, involve cases which took place before the sweaters were washed or dry cleaned. For the most part, consumers do not wash or dry clean new garments until after they have been worn for a considerable period of time. Therefore, the hazards that should be guarded against not only are those which take place after washing and dry cleaning, but also the dangers and risks involved in wearing the garment before it has been dry cleaned or washed. There may be a serious question in the circumstances as to whether the test procedure of the standard is realistically adjusted to conditions applicable to the consumer in his normal use of the garment.

We feel that the standard of flammability fixed should necessarily be one that is found to be adequate to afford that due protection of the consumer which it is the purpose of the legislation to achieve. While the commercial standard specified has been promulgated by the Department of Commerce, it is our understanding that this does not constitute a finding or ruling either by the National Bureau of Standards or by the Secretary of Commerce that in their opinion such standard is adequate from the standpoint of the public.

In respect to section 4 of the bill it is also noted that the Secretary of Commerce "is authorized and directed to establish test methods, procedures, and standards for determining the rapid and intense burning of wearing apparel and fabrics and to promulgate such test methods, procedures, and standards by publication in the Federal Register." Further provision is made to the effect that he shall not promulgate any test method, procedure, or standard, for purposes of the bill, unless in his opinion such "are adequate for the protection of the public interest." As indicated above we regard the necessity of making this finding of adequacy in the public interest as highly important.

The working out of a proper test method involves technical skills and the operation of scientific apparatus, and we are of the opinion that the scientific and technical facilities available in the National Bureau of Standards in the Department of Commerce should be utilized for making the official finding and ruling of adequacy of whatever test method is to be sanctioned by law as determinative.

(5) In further reference to standards it is noted that H. R. 2768 carries subsection 2 (i), defining the term "commercial standard." This subsection in the definitions is unnecessary since the only reference to the term in the remainder of the bill is that found in section 4 wherein the standard referred to is adequately identified and described. We therefore recommend the elimination of subsection 2 (i).

OTHER COMMENT

(6) The first word of section 5 (d) (1), namely, the word "cease," should be changed to the word "cause" to correct a misprint. Likewise, the small letter "i" in the commercial standard number in line 22 on page 5 should be changed to the figure "1" to correct a misprint.

Immediately preceding section 10 it may be helpful to insert the title "Interpretation and Separability," since titles are applied to all other sections.

In section 8 (a) the clause in lines 5 and 6 reading "under the presently existing procedures for the establishment of commercial standards" should be deleted. This clause has evidently been inserted inadvertently. As explained above, it should not be used as a limitation upon the power of the Secretary of Commerce to promulgate test standards which he finds necessary in the public interest. Opportunity for hearing or conferences of all parties concerned in the test standards would still be available under the Administrative Procedure Act, and without the above-quoted clause suggested for deletion.

COMMISSION'S SUPPORT OF LEGISLATION

The problem of highly flammable textile merchandise reaching the market and being purchased by consumers who are innocent and unaware of their dangerous character has broken out in cycles and has led to a series of instances in which

consumers have suffered severe burns and even death. The Commission under its authority to act in prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act has proceeded to the extent of its powers to protect the public in respect to such hazardous and dangerous merchandise. Numerous cases have been investigated and after hearings cease-and-desist orders were issued in due course against parties placing such fabrics or garments in the channels of interstate commerce made in such way as to be highly flammable and dangerous.

The Commission does not have authority under present law to forestall the introduction of these products into the channels of trade but can only proceed after the material has gotten into the market. Adequate protection of the public, as well as protection of business itself against the unscrupulous competition which the marketing of the highly dangerous merchandise may generate, requires legislation along the general line of H. R. 2768 which is directed to providing a means of forestalling the introduction into commerce of the dangerous merchandise.

Once the merchandise leaves the factory it quickly becomes so scattered into various channels of trade that instances of burning of consumers are bound to occur because of the inability adequately to trace the articles or have them removed from sale. This points up the importance of the prophylactic character of the bill.

In our opinion passage of the legislation, subject to the matters suggested above, will go far toward providing necessary protection of the public, as well as protection of those merchants or dealers who in instances may innocently handle the goods in ignorance of the dangers they are thereby imposing upon their customers.

By direction of the Commission.

Sincerely yours,

JAMES M. MEAD, *Chairman.*

N. B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on March 19, 1953, and on March 20, 1953, the Commission was advised that there would be no objection to the submission of the report to the committee.

JAMES M. MEAD, *Chairman.*

[NOTE.—A similar report was received from the Federal Trade Commission on H. R. 389, a bill practically identical to H. R. 2768, and generally similar to H. R. 5069.]

THE SECRETARY OF COMMERCE,
Washington 25, April 15, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This letter is in further reply to your communications of February 10, March 12 and 25, 1953, requesting the views of this Department with respect to H. R. 2768, H. R. 3851, and H. R. 4159, respectively, bills to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

We believe that legislation for this purpose is essential for the protection of the public. Recent newspaper accounts of loss of life of children and adults caused by ignition of clothing, such as the appropriately designated "explosive sweaters," make out a case for the need for regulation in this field. State action is generally limited to regulation at the point of sale to the ultimate user. State action also falls on the usually innocent retailer rather than on the manufacturer who, in contrast to the retailer, is in a position to know of the potential dangerous character of the fabric utilized in making the garments. Because of the interstate traffic in these materials, Federal regulation appears to be the only effective means of eliminating the hazard.

We wish to invite your attention to the fact that H. R. 4159 and H. R. 3851 provide that the standard of flammability shall be the commercial standard now in effect and any modification thereof shall be made in accordance with presently existing procedures for the development of commercial standards.

The assent of a large segment of the affected industry is required before standards are placed in effect or modified under presently existing procedures. Where

adherence to commercial standards is purely voluntary, this procedure is satisfactory. The required assent to modifications of the standards of flammability by a substantial number of the persons to be regulated by the proposed law raises a question of the constitutionality of the delegation of authority to establish modifications in the standard. The applicable law is not clear. In any event the policy involved appears subject to question.

For these reasons, H. R. 2768, which does not require industry approval of changes in the present standard, is, in our opinion, preferable if certain minor amendments are made thereto.

On page 5, line 22 should read "Commercial Standard CS191-53, 'Flammability of Cloth'".

On page 5, line 24, the words "shall be effective" should be inserted before the period.

On page 6, line 24, the first word should read "cause".

On page 10, lines 5 and 6, the words "under the presently existing procedures for the establishment of commercial standards" should be deleted since the present procedures for establishing standards do not relate to the furnishing of guarantees.

Subject to your consideration of these amendments, the Department recommends enactment of H. R. 2768.

We have been advised by the Bureau of the Budget that there would be no objection to our submission of this letter.

If we can be of further assistance in this matter, please call on us.

Sincerely yours,

C. R. SHEAFFER,
Assistant Secretary of Commerce.

[NOTE.—The reported bill H. R. 5069 is generally similar to the above-mentioned bills.]

DEPARTMENT OF AGRICULTURE,
Washington 25, D. C., May 1, 1953.

Hon. CHARLES A. WOLVERTON,
*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.*

DEAR MR. WOLVERTON: This is in response to your request of February 10 for a report on H. R. 2768, a bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

This Department has an interest in the proposed legislation as it relates to the utilization of fibers of agricultural origin in the manufacture of yarns and fabrics used in clothing and as it relates to the protection of the public from dangerously flammable materials.

The bill would impose various prohibitions upon the manufacture and distribution of articles of wearing apparel and fabrics for use in wearing apparel which are so highly flammable as to be dangerous when worn by individuals. The bill provides that the Secretary of Commerce shall establish test methods, procedures, and standards for use in determining high flammability within the meaning of the proposed act but apparently would allow the use of the present Commercial Standard for Flammability of Clothing Textiles promulgated by the Secretary of Commerce until other test methods, procedures, and standards are promulgated by him under the bill.

The development of an impartial standard of flammability requires measuring the speed of burning of fabrics and its correlation with associated human hazards involving careful scientific experimentation and application of the results. The National Bureau of Standards in the Department of Commerce has already given attention to procedures and standards for determining the rapid and intensive burning of wearing apparel and fabrics, and, we understand, is in position to make recommendations on the formulation of appropriate test methods, procedures and standards for determining high flammability. Since such information is available, we suggest that the standard of flammability be defined in paragraph 2 of section 4, and that the last paragraph of this section be deleted. If this suggestion is adopted, the definition of commercial standard in subsection 2 (i) on page 3 of the bill should also be omitted.

This Department recommends that, with the changes specified above, this bill be given favorable consideration.

The Bureau of the Budget advises that from the standpoint of the program of the President there is no objection to the submission of this report.

Sincerely yours,

E. T. BENSON, *Secretary.*

[NOTE.—A similar report was received from the Department of Agriculture on H. R. 389, a bill practically identical to H. R. 2768, and generally similar to H. R. 5069.]

BOARD OF COMMISSIONERS,
DISTRICT OF COLUMBIA,
March 19, 1953.

Hon. CHARLES A. WOLVERTON,

*Chairman, Committee on Interstate and Foreign Commerce,
United States House of Representatives, Washington, D. C.*

MY DEAR MR. WOLVERTON: The Commissioners have for report H. R. 389 and 2768, 83d Congress, substantially similar bills to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

The Commissioners are of the view that the proposed legislation, if enacted, would tend to prevent such occurrences as the tragedies occurring in 1945 and 1946, involving the death of 1 child and the injury of 3 others as the result of wearing highly flammable cowboy suits having fleecy, brushed rayon pants. Further, in early January 1952, only the prompt action of the fire marshal of the District of Columbia coupled with widespread publicity, brought to the attention of the public the great danger inherent in the wearing of certain sweaters then being sold in the District by a number of itinerant vendors. These sweaters, of a highly flammable, almost explosive fabric, were similar to those causing injury elsewhere in the United States, and it is believed that had the fire marshal not acted promptly, these sweaters might have caused injury, and perhaps death, to residents of the District. H. R. 2768, if enacted, would tend, it is believed, to reduce the likelihood of such sweaters, and similar highly flammable apparel and fabrics, being brought into the District for purposes of sale.

The Commissioners desire to point out that the third paragraph of section 4 of H. R. 2768 appears to be incomplete, and perhaps should be completed by inserting, immediately before the period at the end thereof, a comma and the phrase "shall be applicable." Further, the word "cease" appearing in line 24 of page 6 of H. R. 2768, and in line 1 of page 7 of H. R. 389, probably in each case should read "cause."

H. R. 2768, with its reference in the third paragraph of section 4 to the promulgation of "Commercial Standards CS 191-53, 'Flammability of Clothing Textiles,'" as compared with the reference in the same paragraph of H. R. 389 to "Recommended Commercial Standard for Flammability of Clothing Textiles, TS-5131," would appear to supersede H. R. 389. Accordingly, the Commissioners make no recommendation with respect to H. R. 389, but recommend the enactment of H. R. 2768 as being in the welfare of, and constituting a safeguard for, the residents of the District of Columbia.

As you requested in your letter of January 12, 1953, on H. R. 389, and of February 19, 1953, on H. R. 2768, this report is being submitted in sextuplicate, so as to provide three copies for your files on each of these bills.

The Commissioners have been advised by the Bureau of the Budget that there is no objection on the part of that office to submission of this report to the Congress.

Very sincerely yours,

F. JOSEPH DONOHUE,
President, Board of Commissioners, District of Columbia.

(NOTE.—The reported bill, H. R. 5069, is generally similar to the above-mentioned bills.)

FEDERAL TRADE COMMISSION,
April 9, 1953.

Hon. CHARLES A. WOLVERTON,

*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington, D. C.*

MY DEAR MR. CHAIRMAN: This is in response to your communication of March 20, 1953, requesting report and comment upon H. R. 3851 entitled "A bill to prohibit the introduction or movement in interstate commerce of articles of

wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes" (83d Cong., 1st sess.).

The text of this bill is in large part identical to that found in H. R. 389 and H. R. 2768, as to which we have heretofore submitted comment. In the circumstances, the new bill, H. R. 3851, retains certain points as well as some others which we believe merit careful consideration by the Congress. Our suggestions and comments in regard thereto are presented below.

We wish, however, to state at the outset that the problem to which the proposed legislation is directed has been the subject of much attention by the Commission. In our view the need for more adequate protection of the public against the hazards and risks arising from the marketing of textile merchandise of highly flammable character is a pressing one.

SCOPE OF H. R. 3851

(1) It will be noted that the bill in its scope is limited to certain articles of wearing apparel and fabrics which are intended or sold for use in wearing apparel. Therefore, such items as blankets for children and adults, bedspreads, laprobes, upholsteries, draperies, stuffed toys, rugs, and household textiles generally are not covered by the measure. These fabrics used in the home can be highly flammable and involve much danger to individual safety in their customary use which is in close contact with persons in the family. They may be especially hazardous to small children and elderly persons who, it may be assumed, are not able to act with as much speed or agility for protecting themselves in the event of fire as are the normal, active, in-between ages.

Exclusion of these textiles, therefore, presents a serious question as to whether the bill should be enlarged in its scope so as to be applicable to such household or family textiles when they are so highly flammable as to be seriously dangerous to individuals in their ordinary use in the home.

We feel that these additional items when made of dangerously flammable materials should not be excluded from the bill unless the committee prefers to have them treated in separate legislation. This might well be deemed by the committee to be a desirable course to follow in view of the apparent need of having at least partial coverage speedily enacted into law.

(2) With respect to the exception provided in section 2 (d) of "hats, gloves, and footwear," it is noted that such is limited by provisos. In previous consideration of legislation of this type we had suggested restrictions of the character set forth in these provisos. Unless restricted at least to the extent thereby attempted, the exemption of hats, gloves, and footwear, it appears, would in instances leave the public exposed to the dangers against which the bill is intended to afford protection.

Without the limiting provisions, such wearing apparel as hoods, baby bonnets, head scarves, and types of headwear which cover the neck, face, or shoulders, are likely to be excluded from the law, although when made of fabrics which under the standards of the bill exhibit rapid and intense burning, they can present hazards of most serious consequence. For the same reason the limitations also properly prevent an exception being accorded to gloves which are very long or are part of another garment, to hosiery, and to types of footwear that form part of another article of wearing apparel. In the event of their becoming ignited these articles present difficulty with respect to the possibility of their quick removal from the person. Such factor is of considerable importance since avoidance of dangerous burns depends in large measure upon the ease and speed with which the garment can be taken off by the wearer.

While not wholly removing the exemption of hats, gloves, and footwear, we believe the provisos set forth in section 2 (d) are necessary to afford certain reasonable limitation of the character mentioned in the interest of protecting the consumer.

(3) Among further exemptions from the measure is that of "fiber, filament, or yarn" as provided in section 2 (e). Textiles within this exempt class are used extensively for hand knitting and making into garments in the home. The hand knitting of sweaters for children and grownups, and other use of yarns and filaments in connection with family-made garments or articles are not uncommon. It appears that materials in this class, especially those of the rather loose or soft type, can be of highly flammable and hazardous character.

In the circumstances it is our view that the exception of fiber, filaments, and yarns contained in section 2 (e) should be removed so that the measure will not exempt from its scope those filaments and yarns sold to ultimate consumers for home knitting or making into garments which in their normal and intended construction and use are so highly flammable as to be dangerous to individuals.

The ordinary yarns or filaments widely used in the home, and which are not of such highly flammable and dangerous character, would not be disturbed by removal of this exemption because the restrictions imposed by the bill are intended to apply only to the materials which exhibit such rapid and intense burning as to be dangerous when worn by individuals.

STANDARD OF FLAMMABILITY

(4) Section 4 of the bill specifies the Commercial Standard CS 191-53 as the required test for dividing between those fabrics and articles of wearing apparel which are so highly flammable as to be dangerous when worn by individuals, and those which are not. This commercial standard was developed, according to our understanding, by the industry under the procedures of the Department of Commerce and the National Bureau of Standards.

The efficacy of the entire legislation under the language of the bill would depend upon whether or not this standard is in fact adequate from the standpoint of affording due protection of the consuming public. It provides, for example, that if, after the fabric has been dry-cleaned and washed, 4 seconds or more are required to burn it a distance of 6 inches when placed at a 45° angle in a draftproof ventilated cabinet, that fabric shall not be considered under the ban of the test and consequently not under the control of this bill. It will be noted that the line of demarcation between the good and the bad, in respect to flammability, is so finely drawn that 1 second of burning determines whether or not the article is of a dangerous character.

As indicated the terms of the standard specifically provide that the fabric shall be evaluated on the basis of its first having undergone dry-cleaning and washing. Dangerously flammable sweaters which gave rise to a rash of burnings in different parts of the country and against which the Commission has proceeded under the limited powers now available to it, involve cases which took place before the sweaters were washed or dry-cleaned. For the most part, consumers do not wash or dry-clean new garments until after they have been worn for a considerable period of time. Therefore, the hazards that should be guarded against not only are those which take place after washing and dry-cleaning, but also the dangers and risks involved in wearing the garment before it has been dry-cleaned or washed. There may be a serious question in the circumstances as to whether the test procedure of the standard is realistically adjusted to conditions applicable to the consumer in his normal use of the garment.

We feel that the standard of flammability fixed should necessarily be one that is found to be adequate to afford that due protection of the consumer which it is the purpose of the legislation to achieve. While the commercial standard specified has been promulgated by the Department of Commerce, it is our understanding that this does not constitute a finding or ruling either by the National Bureau of Standards or by the Secretary of Commerce that in their opinion such standard is adequate from the standpoint of the public.

We regard the necessity of making this finding of adequacy in the public interest as highly important.

The working out of a proper test method involves technical skills and the operation of scientific apparatus, and we are of the opinion that the scientific and technical facilities available in the National Bureau of Standards in the Department of Commerce should be utilized for making the official finding and ruling of adequacy of whatever test method is to be sanctioned by law as determinative.

(5) Further, it is provided in section 4 (b) of H. R. 3851 that when in his opinion the protection of the public interest so requires, the Secretary of Commerce is authorized to modify or supplement the test standard of flammability, provided he follows the procedure used in setting up Commercial Standard 191-53. This requirement would prohibit the Secretary of Commerce from modifying or supplementing the test unless he obtained the consent of 65 percent of the industry or at least of a majority, which is a requirement of the commercial standard procedure. Such presents an unprecedented situation of having the standard of legality or illegality under a penal and civil statute turn upon the consent of the industry to which the legislation applies.

The duty of the Secretary of Commerce to determine appropriate and adequate test standards is highly important and should not in our opinion be subjected to a veto by the industry but should be controlled by what is necessary for proper protection of the public interest. Under the proposed legislation the public's protection against dangerously flammable textile depends almost wholly upon the adequacy of the test method sanctioned by the law.

We suggest in the circumstances that the proviso in section 4 (b) be deleted. A requirement for extending opportunity for hearing and consultation with the industry and all parties concerned when issuing, modifying, or supplementing the test standards remains available under the Administrative Procedure Act.

Section 2 (i), among the definitions in the bill, should also be deleted as superfluous since the commercial standard mentioned is fully and effectively identified in section 4.

GUARANTIES

(6) The guaranty provisions contained in section 8 of H. R. 3851 are considerably different from those contained in the corresponding sections of H. R. 389 and H. R. 2768 previously presented. Under H. R. 3851 the guarantor would not as provided in the other bills guarantee that the product is safe under the test specified or that it is not so highly flammable as to be dangerous to individuals when worn. It would merely warrant in effect "that reasonable and representative tests" have been made and that these show the specific type of fabric when tested under the standard "was not highly flammable within the meaning of section 3."

Fabrics are produced and sold in large bolts containing hundreds of yards. It is generally contended that the test applied to one or more parts of such fabric may indicate it is not highly flammable, whereas tests of various other parts of the same bolt of fabric may show it to be highly flammable and dangerous. If tests made happen not to touch the latter parts or yardage of the bolt, garments made therefrom will necessarily be highly flammable and dangerous and yet will reach the public under an approved guaranty.

In the circumstances of these variables and the debatable point of what shall constitute reasonable and representative tests, there is serious doubt that the guaranty could afford much assurance of safety of the product although it would accord immunity from the act to all subsequent processors, manufacturers, distributors, and dealers.

A further point arises from the insertion in section 5 respecting the enforcement power against a false guaranty. Enforcement is thereby restricted to prevention of "knowingly issuing a false guaranty." It would be most difficult, if not impossible, for the administering agency to sustain the burden of proving the fact of "knowingly" issuing a false guaranty and of showing that the manufacturer has not within the confines of his plant or elsewhere subjected the fabric to "reasonable and representative tests," which is all the guaranty asserts.

Such provisions of the bill are materially unlike those heretofore enacted in rather comparable situations, namely, the Wool Products Labeling Act of 1939 (15 U. S. C. A. 68), the Fur Products Labeling Act passed in 1951 (15 U. S. C. A. 69), and the Food, Drug, and Cosmetic Act of 1938 (20 U. S. C. A. 331 (h), 333 (e)).

Under these statutes, to obtain the immunity which the guaranty provisions afford throughout the channels of trade, the party who desires to exercise his optional right of using a guaranty is required to specifically warrant the product to be of a type which meets the requirements of the law. These laws also provide definite and specific authority for civil enforcement against a party who gives a false guaranty, leaving to the criminal provision the offense of willful falsification. Similarly adequate enforcement authority is lacking in H. R. 3851.

The guaranty provisions used in the Wolverton bill, H. R. 2768, and in the earlier Canfield bill, H. R. 389, follow in substance those found in the above-mentioned statutes. We believe them to be preferable and it is therefore suggested that the guaranty section in the Wolverton bill, H. R. 2768, or that appearing in H. R. 389 which is identical, be used with, however, omission after the word "establishes" of the inapplicable clause, "under the presently existing procedures for the establishment of commercial standards." As so recommended the section would then read:

GUARANTY

"SEC. 8. (a) No person shall be guilty under section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received, that said wearing apparel or fabric is not so highly flammable as to be dangerous when worn by individuals under the provisions of this act. Such guaranty shall be either (1) a separate guaranty specifically designating the wearing apparel or fabric guaranteed, in which case it may be on the invoice or other paper relating to such wearing

apparel or fabric; or (2) a continuing guaranty filed with the Commission applicable to any wearing apparel or fabric handled by a guarantor, in such form as the Commission by rules or regulations may prescribe.

"(b) It shall be unlawful for any person to furnish, with respect to any wearing apparel or fabric, a false guaranty (except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the wearing apparel or fabric guaranteed was manufactured or from whom it was received) with reason to believe the wearing apparel or fabric falsely guaranteed may be introduced, sold, or transported in commerce, and any person who violates the provisions of this subsection is guilty of an unfair method of competition, and an unfair or deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act."

Such suggested amendment also requires restoration of the designation "or 8 (b)" to section 7 immediately after the clause "Any person who willfully violates section 3".

Correspondingly, the designation "or 8 (b)" should be inserted in section 5 (b) in lieu of the clause "or from knowingly issuing a false guaranty under section 8".

In relation to the subject it should be noted that the issuance of a guaranty is not a requirement, but is an optional right accorded to the manufacturer or seller by which he may, if he so desires, confer immunity upon those who subsequently handle his product in the course of trade. It appears highly important, especially in view of the immunity conferred, that these provisions contain adequate safeguards against the possibilities of grave injuries resulting from articles of highly flammable goods sold to the public as made of so-called guaranteed fabrics.

COMMISSION'S SUPPORT OF LEGISLATION

The problem of dangerously flammable textiles reaching the market and being purchased by consumers who are innocent and unaware of their dangerous character has broken out in cycles and has led to a series of instances in which consumers have suffered severe burns and even death. The Commission, pursuant to its authority to act in prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce under the Federal Trade Commission Act, has proceeded to the extent of its powers to protect the public in respect to such hazardous and dangerous merchandise. Numerous cases have been investigated and after hearings cease and desist orders were issued in due course against parties placing fabrics or garments in the channels of interstate commerce made in such way as to be highly flammable and dangerous.

The Commission does not have authority under present law to forestall the introduction of these products into the channels of trade, but can only proceed after the material has gotten into the market. Adequate protection of the public, as well as protection of business itself against the unscrupulous competition which the marketing of the highly dangerous merchandise may generate, requires legislation directed to the purpose expressed in H. R. 3851 of providing a means to forestall the introduction into commerce of the dangerous merchandise.

Once the merchandise leaves the factory it quickly becomes so scattered into various channels of trade that instances of burning of consumers are bound to occur because of the inability adequately to trace the articles, or have them removed from sale. This points up the importance of the prophylactic character of the bill.

We are of the opinion that passage of the legislation amended to cover the matters suggested above will go far toward providing necessary protection of the public, as well as protection of those merchants or dealers who in instances may innocently handle the goods in ignorance of the dangers they are thereby imposing upon their customers.

By direction of the Commission.

Sincerely yours,

JAMES M. MEAD, *Acting Chairman.*

N. B.—Pursuant to regulations, this report was submitted to the Bureau of the Budget on April 9, 1953, and on April 15, 1953, the Commission was advised that there would be no objection to the submission of the report to the committee.

EDWARD F. HOWREY, *Chairman.*

(NOTE.—An identical report was received from the Federal Trade Commission on H. R. 4159, a bill identical to H. R. 3851.)

DEPARTMENT OF AGRICULTURE,
Washington 25, D. C., May 1, 1953.

Hon. CHARLES A. WOLVERTON,
Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives.

DEAR MR. WOLVERTON: This is in response to your request of March 12, 1953, for a report on H. R. 3851, a bill to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

This Department has an interest in the proposed legislation as it relates to the utilization of fibers of agricultural origin in the manufacture of yarns and fabrics used in clothing and as it relates to the protection of the public from dangerously flammable materials.

This bill would impose various prohibitions upon the manufacture and distribution of articles of wearing apparel, and fabrics for use in wearing apparel, which are so highly flammable as to be dangerous when worn by individuals. The bill provides for the use of commercial standards promulgated by the Secretary of Commerce for determining high flammability under the act.

The development of an impartial standard of flammability requires measuring the speed of burning of fabrics and its correlation with associated human hazards involving careful scientific experimentation and application of the results. The National Bureau of Standards in the Department of Commerce has already given attention to procedures and standards for determining the rapid and intensive burning of wearing apparel and fabrics, and, we understand, is in position to make recommendations on the formulation of appropriate test methods, procedures, and standards for determining high flammability. Since such information is available, we suggest that the standard of flammability be defined in paragraph (a), section 4, and that paragraph (b) of this section be deleted.

This Department recommends that, with the changes specified above, this bill be given favorable consideration.

The Bureau of the Budget advises that from the standpoint of the program of the President, there is no objection to the submission of this report.

Sincerely yours,

E. T. BENSON, *Secretary.*

(NOTE.—An identical report was received from the Department of Agriculture on H. R. 4159, a bill identical to H. R. 3851.)

The following letter was received from the Justice Department on the similar Senate bill, S. 715:

DEPARTMENT OF JUSTICE,
Washington, D. C., April 14, 1953.

Hon. CHARLES W. TOBESY,
Chairman, Committee on Interstate and Foreign Commerce,
United States Senate, Washington, D. C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning the bill (S. 715) to prohibit the introduction or movement in interstate commerce of articles of wearing apparel and fabrics which are so highly flammable as to be dangerous when worn by individuals, and for other purposes.

The bill would provide that the manufacture, sale, importation, or transportation in commerce of highly flammable wearing apparel or fabric shall be unlawful and an unfair method of competition and an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. The Secretary of Commerce would be directed to establish and promulgate test methods, procedures, and standards of flammability to be applicable under the bill. The Federal Trade Commission would be charged with the administration and enforcement of the provisions of the measure and also with respect to condemnation and injunction proceedings thereunder. The bill would protect any person who establishes a guaranty received in good faith from the person by whom an article is manufactured that said article is not so highly flammable as to be dangerous under the provisions of the measure. Violations of the bill would be deemed a misdemeanor punishable by a fine of not more than \$5,000 or imprisonment for not more than 1 year or both.

The Department of Justice is in full accord with the proposal to reduce the hazards of flammable material, especially wearing apparel. There are certain features of the bill here under consideration, however, which the Department deems objectionable.

It is suggested that the injunction and condemnation proceedings provided for under section 6 of the bill should be instituted and conducted by the Department of Justice rather than the Federal Trade Commission. Under other statutes of this type, such proceedings are instituted by the United States attorney's acting under authority of the Attorney General. To provide for the conduct of such proceedings elsewhere would mean a wasteful overlapping of functions at the expense of economy and efficiency.

It is also suggested that the word "willfully" should be deleted from section 7 which provides penalties for violations of the act. Legislation of this nature is designed to protect the unwary purchaser and the innocent consumer, and the violator of the act who is in a position to know the quality and characteristics of the product should be held liable regardless of intent. A similar burden is placed on those who come within the purview of the Federal Food, Drug, and Cosmetic Act, the Meat Inspection Act, and other regulatory statutes designed to protect the consumer. (See *United States v. Dotterweich* (320 U. S. 277).)

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

WOOL PRODUCTS LABELING ACT OF 1939

[PUBLIC No. 850, 76TH CONGRESS, APPROVED OCTOBER 14,
1940 (54 STAT. 1128; 15 U.S.C. 68).]

AN ACT To protect producers, manufacturers, distributors, and consumers from the unrevealed presence of substitutes and mixtures in spun, woven, knitted, felted, or otherwise manufactured wool products, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Wool Products Labeling Act of 1939."

DEFINITIONS (54 Stat. 1128; 15 U.S.C. 58).¹

SEC. 2. As used in this Act—

"Person."

(a) The term "person" means an individual, partnership, corporation, association, or any other form of business enterprise, plural or singular, as the case demands.

"Wool."

(b) The term "wool" means the fiber from the fleece of the sheep or lamb or hair of the Angora or Cashmere goat (and may include the so-called speciality fibers from the hair of the camel, alpaca, llama, and vicuna) which has never been reclaimed from any woven or felted wool product.

"Reprocessed
wool."

(c) The term "reprocessed wool" means the resulting fiber when wool has been woven or felted into a wool product which, without ever having been utilized in any way by the ultimate consumer, subsequently has been made into a fibrous state.

"Reused
wool."

(d) The term "reused wool" means the resulting fiber when wool or reprocessed wool has been spun, woven, knitted, or felted into a wool product which, after having been used in any way by the ultimate consumer, subsequently has been made into a fibrous state.

"Wool
product."

(e) The term "wool products" means any product, or any portion of a product, which contains, purports to

¹ The citations that follow the captions in the Act are additions thereto made by the editors of this compilation.

contain, or in any way is represented as containing wool, reprocessed wool, or reused wool.

(f) The term "Commission" means the Federal Trade Commission. "Commission."

(g) The term "Federal Trade Commission Act" means the Act of Congress entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, as amended, and the Federal Trade Commission Act approved March 21, 1938. "Fed. Trade Com. Act."

(h) The term "commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. "Commerce."

(i) The term "Territory" includes the insular possessions of the United States and also any Territory of the United States. "Territory."

MISBRANDING DECLARED UNLAWFUL (54 Stat. 1129; 15 U.S.C. 68a).

SEC. 3. The introduction, or manufacture for introduction, into commerce, or the sale, transportation, or distribution, in commerce, of any wool product which is misbranded within the meaning of this Act or the rules and regulations hereunder, is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act; and any person who shall manufacture or deliver for shipment or ship or sell or offer for sale in commerce, any such wool product which is misbranded within the meaning of this Act and the rules and regulations hereunder is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

Misbranding declared unlawful.

This section shall not apply—

Exceptions.

(a) To any common carrier or contract carrier in respect to a wool product shipped or delivered for shipment in commerce in the ordinary course of its business; or

(b) To any person manufacturing, delivering for shipment, shipping, selling, or offering for sale, for exportation from the United States to any foreign country a wool product branded in accordance with the specifications of the purchaser and in accordance with the laws of such country.

MISBRANDED WOOL PRODUCTS (54 Stat. 1129; 15 U.S.C. 68b).

Misbranded
wool products.

Falsely
labeled, etc.

No stamps
affixed.

Specified
information
not shown.

Wool contents
not legibly
stated.

SEC. 4. (a) A wool product shall be misbranded—

(1) If it is falsely or deceptively stamped, tagged, labeled, or otherwise identified.

(2) If a stamp, tag, label, or other means of identification, or substitute therefor under section 5, is not on or affixed to the wool product and does not show—

(A) the percentage of the total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool if said percentage by weight of such fiber is 5 per centum or more; and (5) the aggregate of all other fibers: *Provided*, That deviation of the fiber contents of the wool product from percentages stated on the stamp, tag, label, or other means of identification, shall not be misbranding under this section if the person charged with misbranding proves such deviation resulted from unavoidable variations in manufacture and despite the exercise of due care to make accurate the statements on such stamp, tag, label, or other means of identification.

(B) the maximum percentage of the total weight of the wool product of any nonfibrous loading, filling, or adulterating matter.

(C) the name of the manufacturer of the wool product and/or the name of one or more persons subject to section 3 with respect to such wool product.

(3) In the case of a wool product containing a fiber other than wool, if the percentages by weight of the wool contents thereof are not shown in words and figures plainly legible.

(4) In the case of a wool product represented as wool, if the percentages by weight of the wool content thereof

are not shown in words and figures plainly legible, or if the total fiber weight of such wool product is not 100 per centum wool exclusive of ornamentation not exceeding 5 per centum of such total fiber weight.

(b) In addition to information required in this section, the stamp, tag, label, or other means of identification, or substitute therefor under section 5, may contain other information not violating the provisions of this Act or the rules and regulations of the Commission.

(c) If any person subject to section 3 with respect to a wool product finds or has reasonable cause to believe its stamp, tag, label, or other means of identification, or substitute therefor under section 5, does not contain the information required by this Act, he may replace same with a substitute containing the information so required.

(d) This section shall not be construed as requiring designation on garments or articles of apparel of fiber content of any linings, paddings, stiffening, trimmings, or facings, except those concerning which express or implied representations of fiber content are customarily made, nor as requiring designation of fiber content of products which have an insignificant or inconsequential textile content: *Provided*, That if any such article or product purports to contain or in any manner is represented as containing wool, this section shall be applicable thereto and the information required shall be separately set forth and segregated.

The Commission, after giving due notice and opportunity to be heard to interested persons, may determine and publicly announce the classes of such articles concerning which express or implied representations of fiber content are customarily made, and those products which have an insignificant or inconsequential textile content.

AFFIXING OF STAMP, TAG, LABEL, OR OTHER IDENTIFICATION (54 Stat. 1130; 15 U.S.C. 68c).

SEC. 5. Any person manufacturing for introduction, or first introducing into commerce a wool product shall affix thereto the stamp, tag, label, or other means of identification required by this Act, and the same, of substitutes therefor containing identical information with respect to content of the wool product or any other products contained therein in an amount of 5 per centum or more by

Other
Information.

Replacing
of label.

Designation on
garments, etc.

Proviso.
Applicability.

F.T.C. to
determine
classes for
labeling.

Affixing of
label, etc.,
to wool
product.

Proviso.
Nature of
manufacturer
on substitute
label;
exception.

weight and other information required under section 4, shall be and remain affixed to such wool product, whether it remains in its original state or is contained in garments or other articles made in whole or in part therefrom, until sold to the consumer: *Provided*, That the name of the manufacturer of the wool product need not appear on the substitute stamp, tag, or label if the name of the person who affixes the substitute appears thereon.

Any person who shall cause or participate in the removal or mutilation of any stamp, tag, label, or other means of identification affixed to a wool product with intent to violate the provisions of this Act, is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

ENFORCEMENT OF THE ACT (54 Stat. 1131; 15 U.S.C. 68d).

Enforcement
of Act.

SEC. 6. (a) Except as otherwise specifically provided herein, this Act shall be enforced by the Federal Trade Commission under rules, regulations, and procedure provided for in the Federal Trade Commission Act.

Authority of
Commission.

The Commission is authorized and directed to prevent any person from violating the provisions of this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act; and any such person violating the provisions of this Act shall be subject to the penalties and entitled to the privileges and immunities provided in said Federal Trade Commission Act, in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though the applicable terms and provisions of the said Federal Trade Commission Act were incorporated into and made a part of this Act.

Penalties.

Rules and
regulations.

The Commission is authorized and directed to make rules and regulations for the manner and form of disclosing information required by this Act, and for segregation of such information for different portions of a wool product as may be necessary to avoid deception or confusion, and to make such further rules and regulations under and in pursuance of the terms of this Act

as may be necessary and proper for administration and enforcement.

The Commission is also authorized to cause inspections, analyses, tests and examinations to be made of any wool products subject to this Act; and to cooperate with any department or agency of the Government, with any State, Territory, or possession, or with the District of Columbia; or with any department, agency, or political subdivision thereof; or with any person.

Inspections,
etc., of wool
products.

(b) Every manufacturer of wool products shall maintain proper records showing the fiber content as required by this Act of all wool products made by him, and shall preserve such records for at least three years.

Maintenance
of records.

The neglect or refusal to maintain and so preserve such records is unlawful, and any such manufacturer who neglects or refuses to maintain and so preserve such records shall forfeit to the United States the sum of \$100 for each day of such failure, which shall accrue to the United States and be recoverable in a civil action.

Forfeiture
for neglect.

CONDEMNATION AND INJUNCTION PROCEEDINGS (54 Stat. 1131; 15 U.S.C. 68e).

SEC. 7. (a) Any wool products shall be liable to be proceeded against in the district court of the United States for the district in which found, and to be seized for confiscation by process of libel for condemnation, if the Commission has reasonable cause to believe such wool products are being manufactured or held for shipment, or shipped, or held for sale or exchange after shipment, in commerce in violation of the provisions of this Act, and if after notice from the Commission the provisions of this Act with respect to said products are not shown to be complied with. Proceedings in such libel cases shall conform as nearly as may be to suits in rem in admiralty, and may be brought by the Commission.

Condemnation,
etc.

If such wool products are condemned by the court, they shall be disposed of, in the discretion of the court, by destruction; by sale; by delivery to the owner or claimant thereof upon payment of legal costs and charges and upon execution of good and sufficient bond to the effect that such wool products will not be disposed of until properly stamped, tagged, labeled, or otherwise identified under the provisions of this Act; or by such

Disposition,
etc.

charitable disposition as the court may deem proper. If such wool products are disposed of by sale, the proceeds, less legal costs and charges, shall be paid into the Treasury of the United States.

Injunction proceedings.

(b) Whenever the Commission has reason to believe that—

(1) Any person is violating, or is about to violate sections 3, 5, 8, or 9 of this Act, and that

(2) It would be to the public interest to enjoin such violation until complaint is issued by the Commission under the Federal Trade Commission Act and such complaint dismissed by the Commission or set aside by the court on review, or until order to cease and desist made thereon by the Commission has become final within the meaning of the Federal Trade Commission Act,

the Commission may bring suit in the district court of the United States or in the United States court of any Territory, for the district or Territory in which such person resides or transacts business, to enjoin such violation, and upon proper showing a temporary injunction or restraining order shall be granted without bond.

EXCLUSION OF MISBRANDED WOOL PRODUCTS (54 Stat. 1132; 15 U.S.C. 68f).

Exclusion of misbranded wool products.

SEC. 8. All wool products imported into the United States, except those made more than twenty years prior to such importation, shall be stamped, tagged, labeled, or otherwise identified in accordance with the provisions of this Act, and all invoices of such wool products required under the Act of June 17, 1930 (c. 497, title IV, 46 Stat. 719), shall set forth, in addition to the matter therein specified, the information with respect to said wool products required under the provisions of this Act, which information shall be in the invoices prior to their certification under said Act of June 17, 1930.

Acts declared unlawful, etc.

The falsification of, or failure to set forth, said information in said invoices, or the falsification or perjury of the consignee's declaration provided for in said Act of June 17, 1930, insofar as it relates to said information, shall be an unfair method of competition, and an unfair and deceptive act, or practice, in commerce under the Federal Trade Commission Act; and any person who

falsifies, or fails to set forth, said information in said invoices, or who falsifies or perjures said consignee's declaration insofar as it relates to said information, may thenceforth be prohibited by the Commission from importing, or participating in the importation of, any wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of this Act.

A verified statement from the manufacturer or producer of such wool products showing their fiber content as required under the provisions of this Act may be required under regulations prescribed by the Secretary of the Treasury.

Verified
statement
showing
fiber content.

GUARANTY (54 Stat. 1132; 15 U.S.C. 68g).

SEC. 9. (a) No person shall be guilty under section 3 if he establishes a guaranty received in good faith signed by and containing the name and address of the person residing in the United States by whom the wool product guaranteed was manufactured and/or from whom it was received, that said wool product is not misbranded under the provisions of this Act.

Guaranty
provisions.

Said guaranty shall be either (1) a separate guaranty specifically designating the wool product guaranteed, in which case it may be on the invoice or other paper relating to said wool product; or (2) a continuing guaranty filed with the Commission applicable to all wool products handled by a guarantor in such form as the Commission by rules and regulations may prescribe.

False
guaranty.

(b) Any person who furnishes a false guaranty, except a person relying upon a guaranty to the same effect received in good faith signed by and containing the name and address of the person residing in the United States by whom the wool product guaranteed was manufactured and/or from whom it was received, with reason to believe the wool product falsely guaranteed may be introduced, sold, transported, or distributed in commerce, is guilty of an unfair method of competition, and an unfair and deceptive act or practice, in commerce within the meaning of the Federal Trade Commission Act.

CRIMINAL PENALTY (54 Stat. 1133; 15 U.S.C. 68h).

Criminal
penalty.

Proviso.
No limitations
on other
provisions.

Certification
to Attorney
General.

Application
of existing
laws.

Effective date.

Separability
clause.

Carpets,
upholsteries,
etc.

SEC. 10. Any person who willfully violates sections 3, 5, 8, or 9(b) of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not more than \$5,000, or be imprisoned not more than one year, or both, in the discretion of the court: *Provided*, That nothing herein shall limit other provisions of this Act.

Whenever the Commission has reason to believe any person is guilty of a misdemeanor under this section, it shall certify all pertinent facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of provisions of this section against such person.

APPLICATION OR EXISTING LAWS (54 Stat. 1133; 15 U.S.C. 68i).

SEC. 11. The provisions of this Act shall be held to be in addition to, and not in substitution for or limitation of, the provisions of any other Act of the United States.

EFFECTIVE DATE (54 Stat. 1133).

SEC. 12. This Act shall take effect nine months after the date of its passage.

SEPARABILITY CLAUSE (54 Stat. 1133).

SEC. 13. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance shall not be affected thereby.

EXCEPTIONS (54 Stat. 1133; 15 U.S.C. 68j).

SEC. 14. None of the provisions of this Act shall be construed to apply to the manufacture, delivery for shipment, shipment, sale, or offering for sale any carpets, rugs, mats, or upholsteries, nor to any person manufacturing, delivering for shipment, shipping, selling or offering for sale any carpets, rugs, mats, or upholsteries.

Approved, October 14, 1940.

HERE IS YOUR FEDERAL TRADE COMMISSION

TEXTILES AND FURS

In point of numbers, at least, the Commission's greatest concentration in halting false and misleading practices results from enforcement of special statutes requiring truthful labeling and advertising of woolens, furs, and textile fiber products. Here the Commission has a different role than under the FTC Act; here it determines standards and actively polices them by inspection, whereas in its broader mission under the FTC Act to halt unfair and deceptive acts and practices in commerce, it performs a regulatory role and can be selective in choosing what matters are invested with the greatest public interest.

To handle the magnitude of textile and fur work requires the effort of a separate bureau of the Commission's staff—and understandably so in view of the fact that more than 100 different industries are engaged in making textile products whose sales run into billions of dollars, second only to food and shelter, while some 175,000 distributors in the fur business are subject to the Fur Act. Moreover, in both the textile and fur industries, highly competitive conditions exist, which make the inspector's job all the tougher. Further complicating the difficulty is the fact that both textiles and furs lend themselves to deception in quality or composition which is difficult for most buyers to detect, for example, the percentage of wool or reused wool or manmade "miracle" fibers present in textile products, or, in the case of furs, whether they have been tip-dyed or otherwise treated to pass for more desirable fur from the same or even different animals. Also, foreign producers of textiles not familiar with U.S. requirements on labeling and invoicing have made the policing of competitive imports difficult.

The Commission also has responsibility for policing the Flammable Fabrics Act. Tests were designed to show when fabrics are sufficiently flammable to be dangerous when worn. An outgrowth of "torch sweater" tragedies, this law is rigidly enforced not only for domestic fabrics but also for imported products.

From the foregoing, it can be concluded that in attacking deceptive acts or practices, the Commission is confronted with a task far beyond its capacity to bring mandatory action against all offenders. The job of keeping chicanery under control can be achieved only with a tremendous assist from reputable elements in business through their own efforts, individual and collective, and through the Commission's guidance program. Also a not inconsiderable factor in combating deception is an alerted public. Chicanery wilts under the narrow eyes of an informed buyer.

RESTRAINT OF TRADE

Most laymen readily concede that the Commission's enforcement of the anti-trust laws is probably of great interest to somebody else. For themselves, the subject is too remote and complicated. They are half right; the subject is indeed complex, but it is no more remote from their interests than is the survival of fair competition in business upon which our standard of living, rooted in economic freedom, depends. Antitrust law enforcement protects the nation's golden goose from predatory businesses not content with its golden eggs.

To characterize the Commission's antitrust efforts as more important than its mission to halt deceptive practices would be as fruitless as to characterize one form of economic murder as more fatal than another. Neither can be tolerated. Yet it is true that monopoly strikes faster at its victims, and even an alert public can do little to stay the executions.

FEDERAL TRADE COMMISSION

Federal Funds

General and special funds:

SALARIES AND EXPENSES

For necessary expenses of the Federal Trade Commission, including uniforms or allowances therefor, as authorized by law (5 U.S.C. 5901-5902) and services as authorized by 5 U.S.C. 3109, **[\$19,500,000]** **\$21,375,000: Provided**, That no part of the foregoing appropriation shall be expended upon any investigation hereafter provided by concurrent resolution of the Congress until funds are appropriated subsequently to the enactment of such resolution to finance the cost of such investigation. (83 Stat. 221; Public Law 91-126; Independent Offices and Department of Housing and Urban Development Appropriations Act, 1970).

PROGRAM AND FINANCING (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Program by activities:			
1. Antimonopoly:			
(a) Investigation and litigation.....	6,054	6,985	7,184
(b) Economic and financial reports.....	1,187	1,316	1,361
(c) Trade regulation rules and industry guides.....	350	419	423
2. Deceptive practices:			
(a) Investigation and litigation.....	4,907	6,121	6,472
(b) Trade regulation rules and industry guides.....	704	840	844
(c) Textile and fur enforcement.....	1,685	2,394	1,888
3. Consumer credit enforcement.....	390	1,695	1,711
4. Executive direction and management.....	385	466	489
5. Administration.....	950	983	1,003
Total program costs funded ¹	16,612	21,219	21,375
Unfunded adjustments to total program costs: Loss on disposition of fixed assets.....	-30	-30	-
Change in selected resources ²	223	-189	-
Total obligations.....	16,805	21,000	21,375
Financing: Unobligated balance lapsing.....	85	-	-
Budget authority.....	16,890	21,000	21,375
Budget authority:			
Appropriation.....	16,900	19,500	21,375
Transferred to other accounts.....	-10	-	-
Appropriation (adjusted).....	16,890	19,500	21,375
Proposed supplemental for civilian pay act increases.....	1,500	-	-
Relation of obligations to outlays:			
Obligations incurred, net.....	16,805	21,000	21,375
Obligated balance, start of year.....	927	1,356	1,603
Obligated balance, end of year.....	-1,356	-1,603	-1,878
Adjustments in expired accounts.....	26	-	-
Outlays, excluding pay increase supplemental.....	16,402	19,400	20,953
Outlays from civilian pay act supplemental.....	1,353	147	-

¹ Includes capital outlays as follows: 1969, \$259,000; 1970, \$241,000; 1971, \$246,000.

² Selected resources as of June 30 are as follows:

	1968	1969	1970	1971
Stores.....	10	11	12	12
Unpaid undelivered orders.....	143	365	175	175
Total selected resources	153	376	187	187

The Commission has the duty of preserving free competitive enterprise through prevention of monopolistic and unfair trade.

1. *Antimonopoly*.—All types of monopolistic restrictions, including price-fixing conspiracies, boycotts, price discriminations, and illegal mergers and acquisitions are examined and corrected. Economic analysis is used in the development of antimonopoly cases. The Commission also oversees the registration and operation of associations of American exporters engaged solely in export trade. In 1971, program activities will emphasize investigation and trial of mergers and other antimonopoly cases, particularly trade restraints in basic consumer industries; expanded compliance efforts to halt illegal mergers and enforce divestiture orders, and an increased enforcement effort to implement Commission decisions.

2. *Deceptive practices*.—False and misleading advertising and other unfair or deceptive practices are prevented by corrective action, including voluntary trade-practice conferences and advertising guides; business and the public are protected from misbranding and nondisclosure of fiber content of manufactured wool products and household textile articles; consumers and merchants are protected from unfair practices with respect to furs and fur products; and the public is protected from dangers inherent in flammable fabrics. In 1971, program activities will emphasize consumer protection and education; additional clarification

and enforcement of the Fair Packaging and Labeling Act, increased compliance enforcement of Commission orders, monitoring of food and drug advertising, scientific advice and assistance on product content, and affirmative action on product disclosure and standardization.

3. *Consumer credit enforcement*.—Inspections and other enforcement activities of the program will expand as recruiting, training, and organizing permit.

4. *Executive direction and management*.—These also include the adjudicatory functions of the Commission.

SELECTED WORKLOAD DATA

	1969 actual	1970 estimate	1971 estimate
Applications for complaint received.....	11,927	14,300	18,075
Investigations initiated or reopened.....	626	930	1,775
Investigation completed or closed.....	954	1,055	1,500
Investigations pending, yearend.....	1,664	1,475	1,705
Informal corrective actions.....	5,768	6,000	6,300
Complaints issued.....	220	279	362
Complaints approved for consent order.....	215	245	310
Orders to cease and desist issued.....	221	265	310
Voluntary compliance actions.....	511	560	745
Compliance actions completed.....	2,093	2,210	2,310
Complaints pending litigation, yearend.....	38	45	50
Trade regulation rules and guides, issued or revised.....	8	8	9
Advisory opinions issued.....	128	135	140

OBJECT CLASSIFICATION (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Personnel compensation:			
Permanent positions.....	14,017	17,514	17,767
Positions other than permanent.....	50	60	60
Other personnel compensation.....	29	50	50
Special personal services payments.....	6	11	11
Total personnel compensation.....	14,102	17,635	17,888
Personnel benefits: Civilian employees.....	1,037	1,306	1,337
Travel and transportation of persons.....	377	697	727
Transportation of things.....	7	9	11
Rent, communications, and utilities.....	374	493	518
Printing and reproduction.....	165	140	155
Other services.....	255	249	259
Supplies and materials.....	229	230	234
Equipment.....	259	241	246
Total obligations.....	16,805	21,000	21,375

PERSONNEL SUMMARY

	1969 actual	1970 estimate	1971 estimate
Total number of permanent positions.....	1,306	1,469	1,477
Full-time equivalent of other positions.....	5	5	5
Average number of all employees.....	1,185	1,335	1,353
Average GS grade.....	9.2	9.2	9.2
Average GS salary.....	\$11,911	\$12,836	\$12,836
Average salary of ungraded positions.....	\$7,621	\$7,980	\$7,980

INTRAGOVERNMENTAL FUNDS—ADVANCES AND REIMBURSEMENTS

PROGRAM AND FINANCING (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Program by activities: Economic study for Department of Transportation on automobile insurance.....	57	57	57
Financing: Receipts and reimbursements from: Federal funds.....	-57	-57	-57
Budget authority.....			
Relation of obligations to outlays: Obligations incurred, net.....			
Outlays.....			

OBJECT CLASSIFICATION (IN THOUSANDS OF DOLLARS)

	1969 actual	1970 estimate	1971 estimate
Personnel compensation: Positions other than permanent.....	49		
Personnel benefits: Civilian employees.....	4		
Travel and transportation of persons.....	4		
Total obligations.....	57		

The Federal Trade Commission's Bureau of Textiles and Fur as it has existed over the past several years has been the governmental organization unit handling the administration and enforcement of four Federal Laws—

1. The Wool Products Labeling Act of 1939 (Public Law 850, 76th Congress, approved October 14, 1968).

2. The Fur Products Labeling Act (Public Law 110, 82nd Congress, approved August 8, 1951; 15 U.S.C. 69).

3. The Flammable Fabrics Act (Public Law 88, 83rd Congress, approved June 30, 1953, as amended by Public Law 629, 83rd Congress, approved August 23, 1954; 15 U.S.C. 1193, and as further amended by S. 1003, approved December 14, 1967).

4. The Textile Flammable Products Identification Act (Public Law 897, 85th Congress, approved September 2, 1958, and as amended by Public Law 35 of the 85th Congress, approved June 5, 1965; 15 U.S.C. 70).

Of these laws the Flammable Fabrics Act, which now, with its amendments, is intended to provide safety for consumers from not only dangerous materials used in the manufacture of wearing apparel but also flammable fabrics used in furnishings, such as bed materials, carpeting, draperies and upholstery. A substantial part of the total resources allocated for use by the Bureau of Textiles and Furs are used for the administration and enforcement of the Flammable Fabrics Act, including the use of an additional 45 employees and \$460,000 added in fiscal year 1970. The other three laws above referred to could well be described as consumer protection laws in that they provide consumers with the assurance of "truth in fabrics." For example, those laws make it unlawful for anyone placing into the channels of commerce the fabric involved or garments manufactured by them when not properly labeled, clearly disclosing the contents of the materials used in such fabrics and garments. They are, indeed, forerunners of the more recent consumer protection legislation provided for truth in packaging and truth in lending.

These consumer protection laws are needed more today than when they were originally enacted. The development of new man-made fabrics, new finishes for textiles and new processing of furs makes it more necessary than ever that the American consumer be protected by being informed concerning the actual content of these materials. In fact, if these labeling laws did not exist or should not be enforced, utter chaos would result in the market place, not only for the consumers but for those who produce and sell these products. Cheaters would abound and those who would wish to engage in fair competition would find themselves helpless in their efforts to combat unfair methods of competition and unfair acts and practices in the sale of these products.

In 1969 with an average of only 39 field investigators the Bureau of Textiles and Furs made approximately 20,000 inspections under the Wool, Fur and Flammable Fabrics Acts. In addition, these same field investigators completed 167 formal investigations in cases which were instituted. Over 95 percent of these formal investigations arose from information obtained in the course of 20,000 inspections performed. In 1969, in the course of its adjudicative work, the Commission issued 221 cease and desist orders. Of these, 126, or more than 51 percent of the total, stemmed from the work of the Bureau of Textiles and Furs under the four acts above mentioned which that Bureau administers and enforces.

Prior to the commencement of the work of this Bureau in the enforcement of the most recent amendment to the Flammable Fabrics Act, the total personnel consisted of only 104, with total appropriation of only \$1,280,000. Following increases in the budget for this Bureau made because of these new amendments to the Flammable Fabrics Law, as well as some additional proposed work under the Wool Products Labeling Act, there was added provisions for additional 70 employees and \$570,000, which provided for a total appropriation for this Bureau of \$1,850,000, for all of its work in the administration and work of the above

mentioned four laws. That would have provided for a total of approximately 170 employees for the Bureau. For fiscal 1971, with the use of approximately the \$1,850,000 for personnel numbering approximately 170, it would appear that with the increased cost of travel funds which would amount to approximately \$150,000 so as to justify the request for approximately \$2,000,000 for the operation of the Bureau of Textiles and Furs throughout 1971. The Commission made a request for such funds and for such purposes. However, it should be noted that commencing on Page 48 of the report of the ABA Commission to study the Federal Trade Commission, as submitted to President Nixon on September 15, 1969, the following statement appears:

"We believe a carefully devised sampling program—cutting present expenditures on enforcement of the Wool, Textile and Fur Acts by one half to two thirds—would be entirely adequate."

It is obvious that if the funds presently being used should be reduced by as much as one half to two thirds as recommended by the ABA Commission, these consumer protection activities would be so reduced as to result in disaster for the protective measures intended. For example, with an average of only 39 field investigators available for this work in fiscal 1969—which is less than one to cover each State of the Union—if this number should be reduced by two thirds, there would be left approximately 13 field investigators which would be on the average of one to cover four or more states.

Where are our priorities for consumer protection or other needed effort? Here for limited funds and limited effort much has been accomplished with only what should be made available for fiscal 1971 much more in the form of consumer protection can be accomplished and at so little a cost. For instance, even if \$2,000,000 should be spent on all of this work for the enforcement of all of these laws throughout fiscal 1971, this would be at a cost of less than one fourth of one cent per capital for the citizens of the United States of America.

BUREAU OF TEXTILES AND FURS

	Allotment fiscal year 1970		Requested fiscal year 1971		Decrease fiscal year 1971	
	Positions	Amount	Positions	Amount	Positions	Amount
Office of the director.....	2	\$168,00	21	\$168,000	—	—
Division of enforcement.....	22	351,000	20	318,000	-2	-\$33,000
Division of regulation.....	103	1,174,000	63	762,000	-40	-\$412,000
Total personal services.....	146	1,693,000	104	2,248,000	-42	-\$445,000
Travel.....	..	138,000	..	88,000	..	-\$50,000
Other expenses.....	..	10,000	..	5,000	..	-\$5,000
Total.....	146	1,841,000	104	1,341,000	-42	-\$500,000

BUREAU OF TEXTILES AND FURS—PERSONNEL AS OF DEC. 31, 1969

	Total	Attorneys	Technol- ogists	Field investi- gators	Clerical
Professional:					
GS-17.....	1	1	—	—	—
GS-16.....	1	1	—	—	—
GS-15.....	8	8	—	—	—
GS-14.....	6	6	—	—	—
GS-13.....	12	9	—	3	—
GS-12.....	24	4	—	20	—
GS-11.....	17	6	1	10	—
GS-9.....	7	—	—	7	—
GS-7.....	2	—	—	2	—
Stenographic and clerical.....	36	—	—	—	36
Total.....	114	35	1	42	36

Note.—Total annual salaries, \$1,457,614.

BUREAU OF TEXTILES AND FURS

The Bureau of Textiles and Furs has responsibility for administering the Wool Products Labeling Act, and Textile Fiber Products Identification Act, the Fur Products Labeling Act and the Flammable Fabrics Act. In order to carry out these duties, the Bureau has been divided into the Office of the Director, the Division of Regulation and the Division of Enforcement.

The principal work of the Bureau is to guard or protect the public; only when efforts to obtain compliance with the assigned statutes through education, cooperation and voluntary compliance are unsuccessful is enforcement sought through complaint and cease and desist order, or, if wanted, by injunction or criminal penalties.

DIVISION OF ENFORCEMENT

The Division of Enforcement is responsible for the investigation and effective disposition of serious violations of the Wool, Textile, Fur and Flammable Fabrics Act. The Division consists of a staff of trial attorneys who supervise the investigation and are responsible for the prosecution of violations considered to be serious enough to warrant issuance of a complaint. It also has a compliance section which polices the cease and desist orders issued under each of these Acts.

During the past year the Division of Enforcement continued to give fast attention to cases arising under the Flammable Fabrics Act. There were twelve cases under this Act which were concluded with cease and desist orders.

The small staff of the Division of Enforcement processed 186 cases either by a recommendation for complaint or by a closing recommendation. Thus, each trial attorney concluded an average of approximately 24 cases during the year.

The Division also includes the Commission's testing laboratory which, during 1969, made 498 fiber content analyses of fabrics and fibers, conducted 599 burn tests under the Flammable Fabrics Act (each of which consisted of 3-10 individual tests), and 327 tests for fur fibers to determine if dye, bleach or other artificial coloration had been added to the furs.

Of the 599 items tested for dangerous flammability, 111 products failed the tests and were removed from public sale as wearing apparel. These products, which numbered in the tens of thousands of individual items, were in 6 different categories, as follows:

Type of wearing apparel	No. of products failing burn tests
Fabrics	6
Scarves	55
Sweat shirts	3
Garments	10
Nonwoven fabrics and garments	3
Wood chips and flowers	34
Total	111

The 323 tests of fur products included, for example, samples of furs obtained from some 170 manufacturers, some 75 of which the tests revealed were misbranding dyed fur skins as natural. Tracing the products and subsequent corrective action in thousands of individual garments resulted in a savings of many thousands of dollars by the consuming public.

As of July 1, 1969, the formal cases on the Docket of this Division were:

Wool	56
Fur	120
Textile	69
Flammable fabrics	15
Total	260

It is considered desirable, *as an average*, to handle all cases in a period of one year. Although some cases will remain on the docket for longer periods and many may be disposed of in a shorter period, the target to be achieved in this plan is disposition of cases, on the average, in one year.

COMPLIANCE SECTION

The Compliance Section of the Division of Enforcement obtains compliance with Commission cease and desist orders as they are issued under the four Acts administered by the Bureau, directs and analyzes investigations of suspected violations of orders, and refers through the Commission such violations as warrant proceedings for civil or criminal penalties in the Federal District Courts.

FY 1969 commenced with 105 active compliance cases. During the year new orders and reopened cases brought the total assignment to 264 cases of which 116 were closed, leaving 148 at the beginning of 1970.

A judgment in the amount of \$15,000 was filed during the year in a civil penalty suit. Seven other civil penalty suits were pending in various United States District Courts at the close of the year. This phase of the Compliance Section's work is particularly exacting and time-consuming. It requires the preparation of all essential papers to be filed in court and for use in trial and cooperation with the United States Attorneys throughout the proceedings.

In instances where serious violations of orders are found, full enforcement necessitates proceedings for penalties, not only for the effect on the violating parties but also to operate as a deterrent against others who may be similarly involved. In 1969 only four cases were prepared for certification to the Attorney General as civil penalty suits. Some matters which might have resulted in penalty cases were by necessity handled administratively.

At the end of June 1969 the Compliance Section of the Division had approximately 1,650 Commission orders to supervise and police.

DIVISION OF ENFORCEMENT—OPERATIONS AND STATUS REPORT FOR YEAR ENDING JUNE 30, 1969,
INVESTIGATIONAL CASES

Workload statistics	Wool	Fur	Textile	Flammable fabrics	Total	Percent change from 1968
Cases at the beginning of 1969.....	51	60	80	16	207	+9
Investigations initiated.....	46	127	48	18	239	+61
Total number of docket cases considered.....	97	187	128	34	446	+31
Complaints recommended.....	21	48	20	6	95	-14
Complaints previously sent to commission with recommendation for complaint.....	11	21	11	8	51	-----
Complaints approved for issuance.....	29	56	29	12	126	-----
Final orders issued by commission.....	29	56	29	12	126	+95
Consent.....	29	56	28	12	125	-----
Docketed.....			1		1	-----
Assurances of voluntary compliance received.....	11	4	25	7	47	+20
Cases closed for other reasons.....	4	9	6	-----	19	-34
Total cases disposed of during year.....	41	67	59	19	186	+42
Cases on hand at end of 1969.....	56	120	69	15	260	+25

DIVISION OF ENFORCEMENT—DISTRIBUTION OF CASES ON JULY 1, 1969

	Wool	Fur	Textile	Flammable fabrics	Subtotal	Total
Pending cases:						
Awaiting investigation.....	19	48	18	5	90	-----
Awaiting analysis.....	11	11	17	-----	39	129
Cases in which complaints or closings have been recommended but are in various processing stages:						
Affidavits.....		1	7	-----	8	-----
Section 2.14.....	21	43	18	8	90	-----
Consent agreements.....	4	15	3	2	24	-----
Closings.....	1	1	6	-----	8	130
Cases in trial status.....		1	-----	-----	1	1
Total.....	56	120	69	15	260	260

DIVISION OF REGULATION

The Division of Regulation is responsible for the inspection of textile and fur products in manufacturing establishments and distribution channels in order to protect manufacturers, distributors and consumers against misbranding or false and misleading advertising of these products, and to insure consumer safety against the hazard of flammable fabrics. In so doing, not only is the safety and welfare of consumers increased directly, but also indirectly, in that competition is made fairer by the elimination of certain unfair trade practices.

Consultation with industry members and their counsel is a continuing responsibility of the attorneys in the headquarters office. This may follow inspection trips by men in the field or prior correspondence with the industry member involved. From time to time representatives of large mills or fiber producers will have their production engineers and counsel check with us on proposed or changed tags, labels, tickets, etc., intended to be sent to the cutters who use these labels on the end products.

In addition to the general duties and responsibilities set out above, the Division has close contact with the Customs authorities as well as considerable activity with other governmental agencies. Substantial correspondence and many personal conferences are carried on with organizations such as Better Business Bureaus, Chambers of Commerce and Trade Associations which represent all phases of manufacture and distribution of textiles and furs. All of these activities require the expenditure of a considerable amount of time and are most important in obtaining voluntary compliance by business and industry.

In 1971, the Bureau plans to vigorously enforce the four statutes assigned to it for administration as far as its personnel and funds will allow. Priority will be given to inspections and investigations under the Flammable Fabrics Act, and local and State fire officials will be contacted and educated as to the Federal requirements and as to the type of fabrics and products that might fail the flammable fabrics test. The assistance of these officials will be solicited in enforcing the Flammable Fabrics Act in order to afford the greatest possible protection to the general public from injuries and death resulting from fabric and clothing fires.

The labeling, invoicing and advertising requirements of the Wool Act, the Textile Act and the Fur Act, together with the policing of the Flammable Fabrics Act, are administered primarily through the inspection of mills, manufacturers, importers, wholesalers and retailers of textile and fur products. The staff stationed throughout the country give priority to formal investigation of the Division of Enforcement, looking toward possible Commission complaints and orders against the hard core violators. The balance of their time is spent on the inspection and education work of the Division.

New specifications are expected to be published soon by the Department of Commerce which will require the inspection of many manufacturers and distributors not now subject to the statutes administered by the Bureau, i.e., manufacturers, wholesalers, and distributors of mattresses, box springs, upholstered furniture, etc. When specifications are issued by the Department of Commerce covering interior furnishings, it is expected that State and local officials will ask for the assistance of the Bureau's investigators whenever fires occur in which products subject to the Flammable Fabrics Act are involved and when there appear to be possible violations of the Federal law.

The Division's textile and fur investigators in the field perform inspections and counsel businessmen regarding the requirements of the four Acts and the rules and regulations. Administrative handling of minor deficiencies in labeling, advertising or invoicing (as the case may be with the particular Act involved) is performed. Immediate informal correction is often made by the person being interviewed and reported to the headquarters office by the investigator.

Division of regulation—workload statistics—1969

Gross sales of firms inspected.....	\$16,625,675,000
Approximate inventory of firms inspected.....	1,744,168,000
Firms inspected revealing deficiencies (percent).....	61

	Wool	Textile	Fur blefabrics	Other	Total
Number of establishments inspected	4,751	7,127	1,545	6,513	16
Number of products with labeling deficiencies	345,041	4,386,607	30,847	11,472	4,773,967
Dollar value of deficiency labeled products	\$7,532,000	\$41,521,000	\$2,817,060	\$120,000	\$51,990,000
Records deficiencies	227	527	197	2	953
Invoicing deficiencies		492	570	1	1,065
Advertising deficiencies found during inspections		548	120	6	674
Supplier deficiencies	1,468	7,348	508	4	9,336
Informal assurances obtained	1,072	3,262	786		5,120
Registered numbers issued	135	1,154	81		1,370
Continuing guaranties filed	119	420	44	860	1,443
Publications issued	3,013	18,253	3,423	1,179	335
					27,203

In the headquarters office, the staff engages in the several activities to achieve voluntary compliance, renders legal opinions and interpretations, maintains records of approximately 32,000 active continuing guaranties filed under the four Acts, issues registered identification numbers to be used in lieu of the manufacturer's or distributor's name under the Wool, Fur and Textile Acts, which currently approximates 45,000 active firms, and maintains inspection and other records concerning the activities of the Bureau. Another important duty is the drafting of proposed rules and regulations for submission to the Commission for consideration and appropriate action.

REDUCTION IN BUREAU RESOURCES—1971

The Bureau of the Budget has recommended that the resources available for administering the Wool Products Labeling Act, the Textile Fiber Identification Act and the Fur Products Labeling Act be reduced by 42 positions and \$500,000 in 1971. No reductions were recommended for policing the amended Flammable Fabrics Act.

CENTER INDEPENDENT OIL Co.,
Smock, Pa., March 6, 1970.

Congressman JOHN DINGELL,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN DINGELL: The Center Independent Oil Company Inc. has a Sinclair-BP jobbership located in Smock, Pennsylvania. We have marketed their products for three years. The company markets gasoline, fuel oil, motor oil, and greases to approximately sixty service stations and thirteen hundred home heat accounts in five counties. (Fayette, Greene, Westmoreland, Washington and Allegheny).

In November 1968, we were told that the British Petroleum Corporation had acquired all the Sinclair properties in sixteen eastern states. At that time we were informed we would become a B.P. jobber.

Last April we were told that The Standard Oil Company of Ohio and The B.P. Oil Corporation American LTD had completed a merger pending a ruling from the Justice Department.

Upon hearing this, we were told that we would be rebranded B.P. in April, of 1970. B.P. suggested that we start reeducating our dealers and personnel of the insuing change over. Accordingly we did. On November 10th and 11th, 1969, The B.P. Oil Corporation held a meeting of all its jobbers and marketers in Miami, Florida. At this meeting the rebranding program was presented to us. Again we were very enthusiastic and proceeded to put we a full fledge sale campaign for B.P.

On March 4, 1970, we along with one other jobber and fourteen marketers were called to a meeting in Pittsburgh, Pennsylvania. At this meeting we were informed that B.P. Oil Corporation could not rebrand us in April or in fact not at all. They stated that the Justice Department of the United States said that the BORON (Standard Oil of Ohio) flag and the B.P. flag could not be flown in the same marketing area due to competition. Therefore, they said our only alternative was to become a Fleet-Wing jobber. Thus we would go from marketing a product which represents the second largest major oil company in the world to one which does not even have 1% of the Ohio market. (see enclosure page 51) Many people in Western Pennsylvania do not know whether Fleet-Wing is a brand of gasoline or a new pair of shoes on the market. This is very degrading to a company (Center), who has worked forty years to achieve honor and respect in the oil industry, to have to go from a top major brand down to almost an unknown. I might add that it took Standard Oil and B.P. over two months after the final decree from the Justice Department (January 1, 1970) to inform us of the change in rebranding. With only one month until rebranding, we do not think this was a fair way to leave us holding the bag. The mighty majors have driven another small businessman down the ladder of success.

Upon hearing the ruling of the Justice Department I ask the question, "How does the Justice Department define competition?" No one in the room had an answer and even Mr. Potvin did not know when I spoke with him. It only seems reasonable that if flying the BORON and B.P. flags together is illegal, how then is it legal to fly the BORON and Fleet-Wing flags together when both are owned by Standard Oil of Ohio. Therefore, we are left with no rebranding program and no major marketing program.

From all the above, Center Independent Oil Company Inc. along with other agents of B.P. have been left with a very serious problem. The problem is thus, we have presold B.P.'s name and products to our customers for over four months. In fact we have sold fifteen new accounts on the program and they have consented to come with us. Presently they are expecting to receive a new sign, a new paint job, a new credit card program, a new advertising program and most of all a new market image. Because of the Justice Department ruling they will never see this and our company stand to lose many of them as customers.

One example of a new customer is a car wash company in Pittsburgh. Two weeks ago we completed a deal for three units involving three million gallons of product per year. The item which clinched the deal was B.P. and its new marketing program. Other dealer's reactions have not been favorable.

Currently our company sells twenty million gallons of petroleum products a year. In the city of Pittsburgh we sell over seven million gallons per year. Under the Fleet-Wing brand we venture to say we will lose half of it.

Another example of this is a Pittsburgh dealer who has broken his contract with another major oil company to go with B.P. He was sold on the idea of

B.P. products and their marketing program. The major oil company involved wrote B.P. a letter telling them they would not release the dealer. The dealer's attorney responded saying that the contract was invalid. Therefore as of April 1, 1970 the dealer is left without a major supplier and possible legal action may result against our company as representatives of B.P. I might add that a B.P. sales representative helped to sell the dealer.

"See Assigned Page 1."

With the expectations of all these new customers our company has gone to great lengths to make ready the necessary service and backing to handle them. We estimate that our expenditures will increase approximately \$250,000. This money will be spent for new petroleum equipment (pumps, tanks, lights, trucks etc). Beside this we have purchased a new N.C.R. bookkeeping computer to handle our records. We had planned to open a branch office in Pittsburgh to handle the expected influx of business. This would mean the hiring of new personnel creating more jobs for people.

From the beginning of the merger, many of our customers have been contacted by our competitors. Under normal circumstances this would not bother us. Their major sales talk was one of condemning the British and how the U.S. had thrown them out once before. What troubles us now is that our competitors can recontact our customers and show them how our company has lied and deceived them and that they should change brands immediately or they will be left without a supplier. We have received one such report already. As you might have already surmised we have no ready reply to refute their statement—thus, a loss of customers exists.

If the ruling of the Justice Department and the major oil companies stands and I must become a Fleet-Wing jobber or search for a new supplier with only three weeks notice then I will be forced to live with it. This does not leave much incentive for the small business man to worry about the economy of the country or the welfare of others. It is our earnest desire, with the foregoing information we have shown you why the jobbers and marketers in this area desperately need your help.

Sincerely yours,

R. W. HIGINBOTHAM,
President.
J. R. HIGINBOTHAM,
Marketing Director.

"ASSIGNED PAGE 1"

Another issue that comes up is that at this time the Justice Department can not assure us that the proposed Fleet-Wing deal will be acceptable. If they rule that Fleet-Wing and BORON are competitive and say that Fleet-Wing must be removed, our company is right back in the same spot. If that comes within two (2) years the customers I retain would not stand for another conversion—thus, we would be out of business.

It only stands to reason that Fleet-Wing enters the picture as a very shaky and unknown marketer. With the Justice Department's ruling looming over their head its very hard to come up with large marketing expenditures. Without these they have no marketing program and if they don't have it, it is next to impossible to compete with a strong major who knows he will not be knocked out of the box the next day. Thus neither oil company nor the Justice Department can give us any assurance or direction about the future of our company.

This example was placed upon a separate sheet because Mr. Poirin said this might come under the F.T.C. regulation and they may be interested in reviewing this one particular aspect.

[From National Petroleum News, January 1970]

NEW BOY ON THE BLOCK (BP) THINKS

(By Ken Peterson, managing editor)

Eastern Air Lines delivered me to Miami Beach one hour late, but mollified with what I recall as being at least five glasses of champagne. So mollified, in fact, that my perceptions were correspondingly heightened and I felt a veritable Norman Mailer, debouched upon this pinnacle of Americana to dissect the true significance of British Petroleum's entrance into U.S. marketing, through BP Oil Co., a subsidiary.

Miami Beach because BP Oil had invited about 1,000 people, jobbers and others including wives, to attend an "open house" at which officials would talk about the future of the company. I'd been working on an article about BP Oil, and this seemed a good place to come to find out more.

Sitting with my heightened perceptions in the limosine that would take me to the Americana Hotel, if a driver showed up, the symbolism seemed almost overpowering.

Here was this British oil company, one of the biggest in the world, finally getting into the rich American market. What more appropriate place to announce its plans than Miami Beach, for many the apotheosis of the American dream, the place where a Quaker boy who grew up to be President can dwell among authentic folk heroes like self-made millionaires?

As I watched a roach crawl up the limosine window, I wove together the symbolic threads of British Petroleum celebrating—and anticipating—its success at this holy place of the American success mystique. Yes, it all fit : the stacks of pink luggage piling into a beige and lavender Rolls Royce ; the people arriving with fixed smiles ; the posters on the rear decks of the cabs with a toothsome girl asking, "How about a quickie?" and suggesting a luxury cruise to Freeport for \$25 and up.

When some more passengers showed up a driver appeared, and the limousine headed off after he found what hotels we were going to.

"You going to the oil convention at the Americana?" asked a girl sitting next to me, wearing a chocolate and vanilla pants suit and looking like the girls pictured in the Daily News divorce-court stories about aluminum-extrusion manufacturers.

I said I was going to the BP Oil meeting, and, though it seemed like a silly question, asked her if she was going there, too.

No, she said, but some of her friends were who were gasoline distributors. She was going to a place called the Singapore, next door to the Americana.

When she got out at the Singapore, I asked whether she would be dropping by the Americana to see her friends.

"No, I think they'll be coming to see me," she said.

"Lotta girls come down here on business," said a man in the seat ahead after she left.

Wow. This was the real Harold Robbins stuff. I couldn't wait until I could work this into my scheme of symbolism.

It didn't fit together so well the next morning in the Americana.

The reality of BP Oil is more complex than just a British company trying to look American. There's more to it than that.

BP Oil says it's just "the new boy on the block," but that's not quite the whole story.

Any more than it is to say it's just a British company trying to look American to try to take advantage of depletion allowances and import controls. It's a whole new ballgame—or wicket.

The people around BP Oil, especially the few Britons, aggressively explain that BP Oil Co. is an American company, staffed almost entirely by Americans, and it's going to operate as an American company.

It's just a financial footnote, they indicate, that BP Oil is owned by British Petroleum.

(Or was until BP Oil was merged into Sohio last month, in the latest of a series of ingenious mergers pulled off by the British to get a stake in the lush, formidably protected U.S. market. Anyway, British Petroleum will end up owning both BP Oil and Sohio as soon as it finishes paying off the mortgage in crude oil from its rich Alaskan discoveries. You might say that in the metamorphosis of British Petroleum's entry into the U.S. market, it has passed from the larva stage into the caterpillar. The timetable calls for it to burst forth as a butterfly by 1974.)

In the meantime, though, BP Oil (with Sohio) faces the problem of establishing itself as a viable marketer in the U.S., starting with the less-than-impressive facilities it got from Sinclair by way of Atlantic Richfield in an earlier piece of fancy financial footwork. (For details on the formation of BP Oil, see page 51.)

BP Oil is going progressively through its East Coast marketing territory

changing brand identification from "Sinclair" to "BP" with the energy of a Montgomery finally pushing Rommel backwards through the African desert. The campaign started last fall in Florida and the last Sinclair identification, in Maine, should be pushed into the sea by July 4, a date some see as symbolic.

BP Oil, wearing its Uncle Sam suit, didn't fool around with tea parties while trying to rally the troops. It invited them all down to Miami Beach for a \$200,000 bash.

With British Petroleum's long-time dream of getting a piece of the U.S. action suddenly coming true, even if it is a modestly doggy piece at the moment, BP Oil recognized the need to do something dramatic to rally the troops and establish an identity for the company.

BP took over much of the Americana Hotel, five stars in the Mobil Travel Guide and the wintertime watering spot of labor leaders, Nofl members, and prosperous dentists, garment manufacturers, and real estate men.

It invited down all of its "customers" (jobbers, commission agents, and TBA resellers) and about 120 of its employees to tell them about its big plans. And to convince them, almost all of them veterans of Sinclair marketing campaigns, that they were now dealing with a first-class company that had money to spend and we are going to spend it on marketing. (The Sinclair heritage was the uninvited guest at the banquet. Like an aspiring pillar of the community who grew up on the wrong side of the tracks, BP Oil refers to its former incarnation only by indirection: "the way things used to be"; "the old way"; "formerly . . .")

Morale may be the biggest problem at BP Oil these days, and the Miami Beach convocation was an attempt to build it up. Picking up the tab for a couple nights' lodging, banquet, cocktail party, buffet, and champagne breakfast can boost a company's reputation as one of the last of the bigtime spenders, especially among people accustomed to feeling grateful for a few cans of paint every five years.

No one ever accused Sinclair of being one of the last of the bigtime spenders. "All heart and no money," says one 32-year man with Sinclair, "except that \$3 for the stockholders."

A medium-hard sell was attached to the fun in the sun, a spectacular in which BP Oil explained its future plans and its new identity.

The presentation unfolded in the Americana's Bal Masque room, usually a nightclub featuring bare-breasted girls and trained-monkey acts.

BP banished the girls, brought in a crew from the Jam Handy Organization to put on a very slick multimedia presentation on the theme "It's Your World Now—The World of BP."

The show convinced. It exuded class. Movies glowed on three screens, slides jumped from screen to screen, animated cartoons amused, pro-football shots drew gasps, and the message came through: BP is here, BP is big, BP is going to spend money.

The show boasted a flesh-and-blood BP Oil star, marketing vice president Robert G. Griffin.

Moon-faced, self-effacing Bob Griffin from Missouri, with his flat midwestern intonations, contributes to BP Oil's image as an American company. A former Sinclair marketer, he's probably closer to the mainstream of American life, the Great Silent Majority of oil marketers and consumers, than Miami Beach is. And he's probably closer to the heavily small-town and Southern group of men and women he had gathered.

In the darkened Bal Masque room, after an introductory psychedelic light show and the boldly cut introductory passages of the film show, a palpable sense of relaxation moved through the rows when Griffin came on, as if a roomful of people in dentists' chairs suddenly realized that it wasn't going to hurt, that the dentist was an old friend, and that his new toy actually was sort of fun.

A man from the show's producers said later that they had tried consciously to present something that would be a little more avant garde than the audience was accustomed to. They wanted to create an image for BP Oil as a progressive, modern—even Mod—company. After all, Sinclair's symbol was a dinosaur.

(The loudest spontaneous applause of the hour-long program came during a cartoon sequence when a BP truck rolling along a highway passed a startled dinosaur. The truck waved and sped off. The dinosaur shed a tear and disappeared.)

The messages came through clearly. BP Oil had a "corporate commitment to success in the marketplace," "those who profit most from change are those

who welcome it." "BP is an international oil company, not a foreign oil company." ("After all," a BP man said later, "you don't call Shell a Dutch oil company.")

Alan M. Robertson, BP Oil's executive vice president and British Petroleum's proconsul here, wound up the presentation. He emphasized BP's size and resources, and its commitment to make a success of marketing in the U.S. by spending whatever is necessary. But he damped any hopes of a money tree to be shaken down at will by the indulgent.

"We have a lean organization," he said, and he didn't expect to support anyone else's fat organizations.

"We're dogged and determined," he said, sounding very dogged, determined, and British.

The accent is all relative, though. Later, several drinks into a cocktail party in Griffin's suite, one of Robertson's American cohorts told him he thought it was his best speech yet. "You didn't sound nearly so British, Alan. I could understand every word you said."

General reaction to the presentation was positive, but there wasn't much really new information in it. What was new was the feeling. It was as if a group of hungry men who had been continually promised bread that never arrived now were offered steak by a man who owned a butcher store. It had a ring of credibility.

"People believe us now," says Al Diano, the dapper computer expert who was Sinclair's last marketing vice president, and is now a BP vice president for finance.

A measure of the feeling of the group was the audibly favorable reaction to a statement that BP Oil would repaint all first-class stations every three years.

Griffin later explained that this was no different from general industry practice. "But it's different from Sinclair's," he said. "Sinclair never would say what it was going to do.

"You notice I said 'first-class' stations. I didn't say what determined what makes a station first class." He paused and looked at a waterfall in the Americana's lobby. "Well, I'll determine."

He laughed a little. A man learns the value of easy-going pragmatism while surviving and advancing in a marketing organization like Sinclair's.

GOING FIRST CLASS

Griffin says he's satisfied with the way things have gone for BP Oil since its establishment last January.

Volume is up more than double the industry average of 4% he says. BP Oil shows a net gain of one distributor, having picked up two in Pennsylvania and lost one Sinclair jobber in New York, "by mutual agreement."

"We haven't had any cancellations, but we have done a heck of a lot of selling and explaining."

"It would be silly to say that some of the extremely large-volume, well situated distributors didn't pursue vigorously the opportunities that were available to them," Griffin says. "But at this point we really haven't had that much trouble."

"A lot of jobbers were as nervous as a whole in church," says TBA manager Gerry Davis, and in January, February, and March bought only enough to meet their immediate needs. But TBA sales have been up every month since then, he says.

The brand changeover is going according to schedule, Griffin says, and a station-upgrading program is going well.

After getting established, BP, like Avis, hopes to grow by trying harder, offering better service, says Griffin.

Isn't that what everyone else is doing, too? What makes BP Oil think that it will be any better at getting and keeping good people than anyone else has been? Isn't that a pretty big order?

Griffin agrees that it's a big order.

"But if you don't realize that it needs to be done and make a start in that direction, you certainly won't get it done."

"It's the degree to which you're able to execute the basics that determines how successful you are."

If a British Petroleum chieftain from London asks Griffin what market share he expects to have by 1975, what does Griffin say?

He pauses. "Well, if they provide an adequate amount of capital, we would hope to have no less than 8% of the automobile gasoline market in selected

markets. I think it's physically impossible in a short time frame to do any more than that. But we think that in any major key market where you have less than 5%, you have less than is required to generate the right return on investment.

Someone mentions the lack of overwhelming success that other companies, like Phillips and Standard of California, have had in moving into East Coast markets. Can BP Oil do any better?

"It would be foolish not to think it isn't very difficult to create the kind of market share it takes to be a success," Griffin says. "But there are some differences."

A big one is the difference between starting from scratch, and introducing a new brand into an existing network, even one that "certainly was sort of sluggish in the past few years..."

"We're stronger now than we were six months ago," says Griffin. "We can do things now that we couldn't do then."

One thing he says he's going to do is insist that stations changed over to the BP brand look respectable. "No dogs and cats."

"You can't be wishy-washy on this, that's the way you get doggy networks," says Griffin looking grim, or as grim as he ever looks. Maybe he's just looking like a man who has had more than enough contact with doggy networks.

Another BP man explains that the company will continue to supply a station if a contract calls for that, but no brand change.

Conversing in Miami the day after his big show, during which some station-renovation designs were shown, Griffin told of one largish distributor who had asked how he could go about converting to a mansard-roof design.

"Six months ago, we couldn't even have talked to him about improving his stations. He would have quit.

"We're in much better position that way than six months ago. We're not up with Shell yet, but we can see how we can put together a first-class network."

Other BP Oil people, too, talk about getting up with the Shells and the Humble, sounding somewhat like the American Football League spokesmen before the first Super Bowl game. But they know what the Jets did two years later.

One man who's especially concerned with achieving parity, or superiority, is Alex Gardner, the lean, angular Briton who has spent a couple of years in this country, with BP North America, as something of a marketing liaison man with U.S. companies and who moved over to BP Oil a few months ago as market development manager.

"Compared, for instance, with Shell, we're in a pretty weak position," says Gardner. "We've got to try first to get up with everyone else."

"But that's 'me too.' We need to stand out."

"We're looking at a lot of different things, like self-service and blending. But there are problems."

"If we were starting from scratch—building from the ground up—we might be able to do something like self-service right off."

Gardner talks of self service with wistful enthusiasm. Standing in the Americana's ballroom near a projector showing movies of some of British Petroleum's worldwide activities, he keeps interrupting his conversation to point at the screen. "There. That one's in Switzerland. Now, look at this one in Sweden. That's a new design. And here's what we're doing in the U.K. They're all self-service outlets."

"We're particularly looking at self-service on the Swedish model. All first-class. And with merchandise. Much like what Tenneco is doing in Georgia."

Gardner talks some more of self-service and reverts to a favorite point. "It's got to be first-class. It can't look like some bargain outlet. And you've got to go all the way, not the Humble way with one island at a conventional station."

Griffin, too, talks of self-service, but less evangelically. He went to Sweden recently, spent considerable time observing self-service operations, and came back impressed, "very stimulated by it."

But neither Griffin nor Gardner see self service in BP Oil's immediate future. But further ahead, "I think it has a place in the future without any doubt," says Griffin.

What is in the immediate future is blending pumps for gasoline. Griffin says BP Oil will put in blending pumps in a large urban market by this coming spring. Field sources say the market is Miami.

"That's a possibility," Griffin says with a smile.

BP Oil will use four grades, subregular, regular, middle grade, and premium.

"I don't really call it a test," says Griffin. "I think we're beyond testing in blending. As a concept I don't think it needs to be tested . . . maybe seeing if it fits a particular market."

Griffin came back from Sweden impressed also with the merchandise tie-ins of some stations there. But that's not in the immediate future, either.

Griffin wants to improve dealers' incomes, but the first action in that direction will be in expanding traditional automotive services.

THE BIG PROBLEM

BP Oil's big problem, though, remains people and morale, say people close to the company. Look at the marketing staff.

Most of them were with Sinclair (to many not the most inspiriting experience). Then came Sinclair's merger with Atlantic Richfield (fears that not many Sinclair people would find homes with that well-staffed company). Then Justice Dept.'s objection to the merger (reprieve). Then the deal with British Petroleum to take on Sinclair's Eastern properties (where does this leave us—and what's a BP?). Then BP Oil's proposed merger into Sohio (if it's not one damn thing, it's another). DJ's objection (reprieve). The final approval (apathy; what else can happen?).

The emotional roller coaster carrying BP Oil employes and jobbers may have come to at least a temporary rest, but few seem sure where except that it's at a low point.

"I'm confident about Sohio," says one former Sinclair marketer, sweating like Edmund O'Brien in "The Barefoot Contessa" and downing his Bloody Mary in three swallows.

"The people I really feel sorry for are the great team we established, and now this Sohio thing comes up," says a British Petroleum official. "We're hoping most of them will stay in Atlanta, but. . . ."

It appears that they will stay in Atlanta, and be joined there by Griffin and the rest of the handful of BP Oil executives who have been based in New York.

Griffin continues as marketing vice president for the BP Oil operations, and will report to J. D. Harnett, Sohio senior VP, located in Cleveland.

Alan Robertson is getting a new assignment in the British Petroleum organization, having recovered from a touch of pneumonia contracted during a brief but frigid boating excursion following the Miami Beach meeting.

Farther down in the organization the series of changes has had inevitable effects.

At Miami, one low-level operative from a district that seemed particularly well represented there was asked who was minding the store at home.

"I don't know," he said. "I haven't talked to the office for two days. We may have all new people by now."

Then he looked around a little uncertainly, buttoned his red BP blazer, and added. "But we've got more money to spend than we used to. And we're getting better turnouts at our dealer meetings than we ever have before."

"We've got nowhere to go but up," said a middle-echelon former Sinclair man, referring to both morale and marketing position.

In general, lower and middle rank people seem to feel wary but hopeful. Whatever organization evolves, they reason, it will need frontline troops and platoon leaders.

Griffin concedes the problem. "We'd be completely naive not to admit that a situation like this creates unrest even if everyone is completely informed. I'm sure the people spend some time speculating on what the prospects are, and they'd be less than human if they didn't."

Jobbers worry, too, especially because Sohio is not big on jobbers. "In Ohio Sohio is not a distributor-oriented company," concedes Griffin. "But the facts are that neither is anyone else. It's not a distributor state."

He says he sees a good future for jobbers with BP Oil: "As a company develops its own direct distribution in order to give it the share of the market it needs to sustain its integrated operation, a distributor fills a void and provides an addition to that market development in every case where that distributor can be a profitable operation for himself and for the supplier, and I don't see any change in that relationship at all."

TBA suppliers fall in line with the insecurity parade, too. In addition to the general uncertainty with all the changes, what happens if Sohio takes BP Oil into the Atlas-brand family?

"TBA suppliers are really nervous," says a BP man, "especially Goodyear." (Goodyear has been Sinclair's tire supplier, and has continued with BP Oil.)

A middle-level Goodyear man, however, professes not to worry. "We'd just have to go out and make a better deal to BP," he says. "I'll let Charlie Eaves worry about that." Eaves has been replacement-tire sales VP.

At the TBA trade show held in Miami, one of the places BP's new look came through strongest was the Bell Chemical Co. booth. Bell supplies the entire line of specialty products, from charcoal lighter through car polishes to brake fluid. The entire line got a new look. Polish cans show a gleaming car. Glowing coals adorn the charcoal-lighter can.

"All the old cans looked like oil cans," says TBA manager Davis, a tall man with widely spaced teeth who reflected a new look by wearing red trousers much of the time in Miami.

"I wasn't in favor of these new designs until a man from the George Nelson agency, which developed them, put the old and the new side by side. It was the difference between 1929 and now. I was sold, and I had gone in with a closed mind." He pronounces the year "19 and 29."

A short, dark-haired man from Bell's advertising agency interrupts to tell of talking about the new designs with a longtime Sinclair jobber.

"Old Ralph just scowled and said, 'It looks pretty Mod.'

"Look at your shoes, Ralph," I said. He was wearing pretty modern boots. "You wouldn't have worn them five years ago."

"He just pulled out his pencil and started writing an order."

Everyone agrees that the new look is super. But what if BP Oil goes over to Atlas? "Maybe we'll still supply them," says Bell president C. E. Allerdice Jr., a short, baldish man with steel-rimmed glasses. "We make brake fluid for Atlas now."

Walking around the display area, Davis seems satisfied with what he has wrought. Some 60% of all BP's distributors turned up, but they represent 90% of the volume. "Most of the big customers came," says Davis.

Griffin says the same thing, adding that the site is a factor. The smaller distributors, who perhaps could not afford a long trip were from nearby. The more-distant distributors always come down here anyway, says Griffin.

As he walks around the floor, Davis taps his leg with a long plastic shoehorn, a premium given away by one of the exhibitors at the show. Everyone has one and everyone knows it's a shoehorn, but everyone slaps his leg with it as if it were a riding crop or a swagger stick. It gives the whole scene a not-inappropriate air of a weekend at an English country house.

Around the floor, the people who sell things to, and through, BP Oil wax enthusiastic about the future.

"They're doing a bang-up job," says a nattily attired man with a Roman emperor haircut and fingernails that appear to be lacquered. "Really exciting."

"Doing a great selling job," says another man. "Not like Sinclair used to do."

"Fantastic." "Very exciting." "Tremendous." All of the people who hope to keep a piece of the action say they're very high on BP.

So are the BP wives, though the pretty blonde wife of an Atlanta-based marketer says it doesn't feel any different from being a Sinclair wife.

The handful of Britons in the organization tend to stick together and at some small gatherings the conversation sounds a bit like something from Noel Coward: "Oh hello, Derek. Awfully good of you to come. Where's Cynthia?" "Hello, Jeremy. She's talking to some thundering bore across the room. Hard cheese for her."

But if there's kidding about the British and the British accents, there's a lot of respect, too.

"Alan's a very smart little guy," says an American who has worked closely with Robertson. "Those guys know what they're doing."

Another American echoes what he says, and adds that he thinks the Sohio deal was brilliant, "the most brilliant of all they've done."

The Sohio deal may have been brilliant, but it was not concluded without some flap, according to reports.

Some Sohio people wanted to change the whole BP Oil network over to the "Boron" brand, says a BP official in a position to know, with a baffled expression. "Boron" is the brand Sohio uses outside of its prime Ohio market.

They were talked out of it, he says, but he describes some difficult times.

"Harnett and Spahr thought they knew it all when they came to London," he says, speaking of Sohio president Charles Spahr and executive VP Joseph Harnett. "Then they saw all the headlines about Justice Dept.'s blockage of the merger. They were the biggest headlines since Munich. It's a very emotional

issue in Europe, and Harnett and Spahr began to realize that Cleveland is not the center of the world.

"You know," he said, "if I were Joe Harnett and 54 years old, I'd do whatever I could to please British Petroleum." After all, British Petroleum will regain control by 1974 and the Sohio people will have only a few years to play at being head boys.

The weather in Miami turned cold the morning after the banquet that wound up BP's meeting, but the sun shined brilliantly.

Shivering by the poolside, inflexible in my determination to go home with a suntan, I kept thinking about my conversation late the night before with a London-based British Petroleum executive.

We had been standing in the lobby of the Americana, outside a place with a name like Carioca Room, where a lot of people were shaking gourds.

I had mentioned Union Oil, and the BP man said, "We might buy them to get to the West Coast."

Someone suggested that there might be antitrust problems there.

"Oh," he said. "How about Phillips?"

If you think in terms of opportunities instead of problems, maybe the problems take care of themselves.

LUCKY STORES, INC.,
San Leandro, Calif., January 20, 1970.

Hon. JOHN D. DINGELL,
Member of the House of Representatives,
Rayburn House Office Building,
Washington, D.C.

DEAR CONGRESSMAN DINGELL: For many years the pricing practices of grocery supermarkets in the Sacramento area for the most part have been similar to the practices common in metropolitan communities generally throughout the country. The objective of each operator, naturally, is to achieve higher sales volume, and thereby make his business more profitable. Typically, in attempting to reach this objective, each operator has sought to create for himself an image of low prices by selling some items at prices substantially below their normal shelf prices, most often on weekend advertisements, effective only Wednesday through Sunday. The low margins (frequently losses) on these "specials" would be compensated for by shelf prices on the vast majority of products, higher than those which would have prevailed but for this "advertised special" technique. The housewife would obtain a few bargains here and there, but overall her expenditures for groceries were substantially higher than what would be suggested by reference to the advertisements. A frequent consequence of this high-low pricing has been that persons shopping at certain times have wound up subsidizing those shopping at other times, when "specials" were in effect. Commonly, too, long operating hours, trading stamps and games of chance were offered, the costs of which necessarily were reflected in the prices charged for the products sold.

We at Lucky decided that there was a need for supermarkets which would offer the housewife low everyday prices on all products, except those few the prices of which are regulated at the retail level. We, therefore, embarked upon our discount program. By January 1967, this program was in effect in all of our markets, including those in the Sacramento area. Incident to this discount plan, we eliminated frills. The hours when our stores are open are kept to reasonable times. Though we had not been among those using games of chance, we had been offering trading stamps and we discontinued the distribution of these stamps.

Our Lucky discount program has been successful. Our customers have benefited from significant savings. These savings are important to a great many housewives, who on a daily basis must seek to provide for their families with a budget shrunk by inflation. As a result, our customers have rewarded us with increased patronage, and as our business has grown our profits have increased.

We believe that this policy merits approval, not condemnation. We find ourselves, however, as defendants in civil antitrust lawsuits brought by some supermarkets in the Sacramento area and as the subject of a tremendously costly and burdensome investigation by the Federal Trade Commission.

The civil lawsuits have no basis. The plaintiffs have charged that we are attempting to monopolize the grocery business in the Sacramento area by subsidizing our stores in the Sacramento area with profits from other areas. These charges are untrue. We have denied them in court and we deny them here.

We are not monopolists. We have not attempted to monopolize. We do not want to monopolize and we could not monopolize if we wanted to. We understand that there are over 600 retail grocery outlets in Sacramento County. Of these, Lucky operates only 25, or about 4%. At least two of our competitors have assets far greater than our own.

We are not subsidizing our Sacramento discount operations with profits from other areas. We charge the same prices in our Sacramento markets as we charge in our markets elsewhere in Northern California, including San Francisco and Oakland. The only exceptions to this, other than occasional clerical errors, are a very few, limited local variations to meet specific lower prices charged by significant competitors for important items. All of our markets, wherever located, are operated in accordance with the same discount philosophy.

Of course, since we operate in a large number of states, some of them widely separated geographically, we cannot centrally establish a uniform price for each product, wherever sold. Instead, retail pricing for our markets is done separately by major geographical area (for example, Northern California, which includes all of our California stores except those in the Los Angeles-Orange County and San Diego metropolitan areas) by regional personnel on the basis of local product costs and operating conditions. Consequently, the retail price of a specific item may vary somewhat from one area to another. However, any such variations are incidental to decentralized application of a single-company pricing policy. Everywhere we operate, we operate our markets on a discount basis with low everyday prices.

There have also been charges that we have obtained illegal discounts in the purchase of milk in California. We do not believe our conduct to have been illegal, and these same charges are currently being contested in the courts. Nevertheless, when the subject practices were challenged by officials of the California Department of Agriculture in June 1968, they were discontinued, without any effect upon our pricing policies. This constitutes empirical proof that our discount operations have not been supported by alleged advantages in milk buying.

We do not think that we can be blamed for the fact that some supermarkets in the Sacramento area are not prospering. We cannot remember a time when this was not the case, nor do we know of any other geographical area, whether we have stores there or not, where business reverses do not occur. We, of course, do not rejoice in anyone's adversity, but we have experienced such reverses in varying degrees ourselves and we recognize that such are the necessary consequences of the functioning of a competitive economy.

We have obeyed and continue to obey both the letter and spirit of the antitrust laws. We think price competition is the number one objective of the antitrust laws. In our opinion, it is the plaintiffs who are violating the antitrust laws by trying to pressure us into abandoning low everyday prices and joining them in playing the "high-low game" of weekend specials, and higher regular shelf prices. We have so charged in the pending private litigation and we expect to prove it at trial.

Unfounded private lawsuits are perhaps to be expected. We did not expect an investigation by the Federal Trade Commission. We are confident, however, that it will be shown that we are operating properly and lawfully and that it is not an offense against the laws of the United States to make a profit by doing a better job, in this case by offering the housewife high quality products at low everyday prices.

There are enclosed for your record (a) copies of the principal pleadings in *Murren vs. Lucky Stores, Inc.*, No. 50036 in the United States District Court for the Northern District of California, (b) an order of the District Court denying the motion of the plaintiffs in the *Murren* case to dismiss our antitrust counter-claim against them, (c) a copy of a complaint recently served upon us in *Bell Air Markets, Inc. vs. Foremost Dairies, Inc.*, to which we are preparing a response, and (d) copies of the principal pleadings (except for bulky exhibits) in *Coke vs. Foremost*, No. 593454 in the Superior Court of the State of California for the City and County of San Francisco.

Thank you for affording us this opportunity of responding to the charges made against us.

Very truly yours,

WILLIAM H. DYER, Jr.,

ARTHUR YOUNG & Co.,
New York, N.Y., June 29, 1970.

Mr. BRYAN H. JACQUES,
Staff Director, Select Committee on Small Business, House of Representatives,
Rayburn House Office Building, Washington, D.C.

DEAR SIRS: Mr. Jerrold G. Van Cise, with whom I have had frequent opportunities to explore the possibilities of "cost justification" of price differences under the Robinson-Patman Act, has suggested that I comment on certain matters relating to cost justification. In particular, he has asked me to suggest initial steps which might be taken to encourage the use of cost justified price differences based on a careful consideration of differences in cost when prices are being established and, therefore, before the prices come under investigation or complaint. He and I believe that the establishment of "pre-complaint" cost justification as a practicable defense to price discrimination could lead to greater compliance with the spirit of the Act, increased benefits for companies which make a sincere attempt to comply and consequent benefits to the consumer.

Currently, rightly or wrongly, business managers and their advisors have concluded that they are unable to look to cost differences as an affirmative basis on which to establish price differences. They must, instead, consider them only as a legal defense to be advanced (together with all other available and conceivable defenses) in the face of investigation, complaint or litigation.

He and I agree that the practice of passing cost savings to consumers through the granting of prices which make due allowance for differences in the cost of manufacture, sale, or delivery will become significant only if there is a reaffirmation of the Congressional intent to make such price discrimination legal. This should be followed by an acknowledgement in principle and practice by the Federal Trade Commission that it will openly and actively attempt to establish cost justification as a practicable basis for the determination of acceptable price differences.

There are two steps which, in my opinion, could be taken immediately by the Commission to make the cost proviso more useful and meaningful:

First would be the release by the Commission of a series of "cost justification case studies" which would illustrate the principles and techniques used in "successful" cost defenses submitted to the Commission. The case studies would indicate whether the cost defense was acceptable in whole or in part or whether an investigation was concluded or a complaint dismissed as a result of all evidence submitted, including cost justification which was not rejected after thorough investigation. (The Commission has seemed reluctant to admit officially that the cost defense has been a factor in such decisions although individual members of the staff have conceded openly that such is the case.)

A second, but concurrent, step would be a request by the FTC to the American Institute of Certified Public Accountants that a special committee of the AICPA dialogue with the AICPA committee. Despite initial indications of interest in the preparation of a publication which might be titled "Guidelines for the Determination of Cost Differences and Price Differences Under the Cost Proviso of the Robinson-Patman Act."

Several years ago, primarily as a result of discussions with Mr. Van Cise, I requested that the AICPA appoint a consulting committee to cooperate with the FTC. In 1965 and 1966 such a committee was appointed. As the chairman of the newly-formed committee, I set out with Mr. Van Cise to interest the Commission and its staff in exploring the contribution which the organization of professional independent certified public accountants might make to the Commission's effective administration of the pricing laws. I discussed some of our hopes and plans with Mr. Willard Mueller, then Chief Economist to the Commission, who encouraged us to proceed and obtained for distribution to the Commissioners copies of a talk and an article I had prepared illustrating some ideas on the subject. Mr. Van Cise and I also had several discussions with senior attorneys on the Commission's staff inquiring about interest within the Commission in starting a dialogue with the AICPA committee. Despite initial indication of interest in the concept, no formal meetings with the Committee or its members took place and the AICPA concluded that no useful purpose would be served by reappointing the committee in 1967.

The AICPA has a long record of successful and fruitful cooperation with government agencies and commissions (e.g.: The SEC, the ICC, the CAB) in large part through committees appointed for the purpose. I am sure that the AICPA

would respond promptly and enthusiastically to a request for similar consultation and cooperation with the FTC.

I would be pleased to discuss the ideas which led to the formation of the AICPA Committee on Cooperation with the Federal Trade Commission in 1965 or to arrange meetings with present officers or committee chairmen of the AICPA. I believe that the interests and objectives of the members of the accounting profession in helping the managers of American business reach workable and efficient solutions to the difficult problems of competitive pricing are consistent with those of the FTC and its staff and that there are significant benefits to be realized from the increased understanding which would grow out of an exchange of opinions and ideas.

Yours very truly,

DONALD J. FENNELLY.



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